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# REPORTS

OF

## CASES ARGUED AND DETERMINED

IN THE

# SUPREME JUDICIAL COURT

OF

# MASSACHUSETTS.

---

BY

CHARLES ALLEN.

---

VOLUME X.

---

BOSTON:
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1866

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# JUDGES

OF THE

# SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. GEORGE T. BIGELOW, CHIEF JUSTICE.
HON. CHARLES A. DEWEY.
HON. THERON METCALF.
(Resigned August 31st 1865.)
HON. EBENEZER R. HOAR.
HON. REUBEN A. CHAPMAN.
HON. HORACE GRAY, JR.
HON. JAMES D. COLT.
(Appointed September 11th 1865.)

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ATTORNEY GENERAL.

HON. CHESTER I. REED.

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# CASES

ARGUED AND DETERMINED

IN THE

# SUPREME JUDICIAL COURT

AT THE

## JANUARY TERM 1865, AT BOSTON.

PRESENT:

HON. GEORGE T. BIGELOW, CHIEF JUSTICE.
HON. CHARLES A. DEWEY,
HON. THERON METCALF,
HON. EBENEZER R. HOAR,
HON. REUBEN A. CHAPMAN,
HON. HORACE GRAY, JR.,
} JUSTICES.

## ESSEX COUNTY.

[CONTINUED FROM VOLUME IX.]

### CHARLES ODELL *vs.* JAMES A. ODELL & others.

A bequest of an annual sum, out of the income from real estate, for fifty years to trustees, to be invested by them and accumulated during that time, and then applied to establish a charity, is a valid bequest; even if the accumulation cannot be allowed for so long a period.

What is the legal limit of accumulation for a charity, *quære*.

A will contained the following bequest: "I give to the trustees of the Salem Savings Bank in trust one hundred dollars annually for fifty years, to be paid to them by my executors, to be safely invested by said trustees, the interest to be added to the principal by them semi-annually. At the expiration of fifty years the sum which shall have accumulated shall be appropriated by a society of ladies from all the Protestant religious societies in Salem to provide and sustain a home for respectable, destitute, aged, native-born American men and women. The above annual payment shall be made from the income of my



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real estate, which real estate shall be held in trust by my executors, until the last payment shall have been made to the trustees of the Salem Savings Bank; then my real estate shall be divided equally among the grandchildren of my late brother James." *Held*, that this was a valid bequest, even if the direction for accumulation was invalid.

BILL IN EQUITY, filed by Charles Odell, one of the executors named in the will of Thomas F. Odell, and who had been appointed executor and trustee under it, to obtain the instructions of the court as to the validity and effect of the following article in the will:

"6th. I give to the Trustees of the Salem Savings Bank in trust one hundred dollars annually for fifty years, to be paid to them by my executors, to be safely invested by said trustees, the interest to be added to the principal by them semi-annually. At the expiration of fifty years the sum which shall have accumulated shall be appropriated by a society of ladies from all the Protestant religious societies in Salem to provide and sustain a home for respectable destitute aged native-born American men and women. The above annual payment shall be made from the income of my real estate, which real estate shall be held in trust by my executors until the last payment shall have been made to the trustees of the Salem Savings Bank; then my real estate shall be divided equally among the grandchildren of my late brother James."

The testator further directed his executors to pay to the widow of his brother James, from the yearly income of his real estate, two hundred dollars annually during her natural life; and the residue of said income, "after making the foregoing payments and paying all necessary expenses," among the children of his said brother, of whom the plaintiff was one, and who were also his heirs at law. The will contained several legacies which do not affect this case, and no residuary devise or bequest. The real estate of which the testator died seised had been appraised at the value of $11,200.

Answers were filed by the Trustees of the Salem Savings Bank, a corporation duly established by law of the Commonwealth, who insisted that the bequest to them is valid, but declined the trust thereby created, and prayed that a new trustee

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might be appointed in their stead; and by all the children of James Odell except the plaintiff, who alleged that the sixth article in the will was inoperative and void, and that said children were entitled to all the income of the real estate, except the annuity to the widow of James Odell, during her lifetime, and to the real estate itself upon her death.

*J. W. Perry*, (*C. Kimball* with him,) for the heirs at law. Text books and judges have incidently remarked, as in 7 Allen, 247, that charities are not obnoxious to the rule against perpetuities; but by this it is merely intended that a present gift to a charity, to be perpetual, is not void for that reason. It was never intended by this expression that an executory devise to a charity which is not to vest within the required time is good because it is to a charity. If this were so, the rule as to executory devises would be as follows: "Property given by way of executory devise must vest within a life or lives in being, and twenty-one years and nine months, unless the gift is to a charity, in which case there is no limit." This exception is nowhere to be found. See *Company of Pewterers* v. *Christ's Hospital*, 1 Vern. 161; *Attorney General* v. *Gill*, 2 P. W. 369; *Hillyard* v. *Miller*, 10 Penn. State R. 326.

Trusts for accumulations are governed by the same rules and reasons as executory devises, in the absence of statute provisions to the contrary. *Thellusson* v. *Woodford*, 4 Ves. 227; *S. C.* 11 Ves. 112. *Brattle Square Church* v. *Grant*, 3 Gray, 142. 1 Jarman on Wills, (4th Amer. ed.) 220–222, 265. And if a testator takes an absolute term longer than twenty-one years, without embracing a life, for an accumulation, the devise is void, because the life might not have lasted for an hour. This rule applies to accumulations for charities as well as for individuals, because the rule is analogous to the rule in relation to executory devises, and the public inconvenience is as serious from accumulations for charity as for any secular purpose. If this is not the rule, large sums may be given to accumulate for indefinite periods, for future charities, and finally absorb and control all the property in the Commonwealth.

If this bequest for accumulation is void for the fifty years, it

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is void *in toto*, and the court cannot establish the gift to accumulate for a less period. Lewis on Perp. 592. 2 Roper on Leg 1557. This was modified in England by *St.* 39 & 40 Geo. III. *c.* 98; but we have no similar statute.

The question then arises, whether the gift itself is void, as well as the direction to accumulate for fifty years. It is possible that a present gift to a charity might be sustained, though the directions for its management were impossible or illegal. *Williams* v. *Williams*, 4 Selden, 538. In the will now under consideration, no principal sum is given at all, but a portion of the income of the real estate, year by year. The whole fund is accumulation; and the direction to accumulate is so interwoven with the substance of the bequest that it cannot be stricken out without destroying the bequest. *Wilson* v. *Lynt*, 16 How. Pract. R. (N. Y.) 348. The ownership of the fund is suspended for fifty years; and it amounts simply to an executory devise. This being void, the Savings Bank, as the first takers, would take the whole fund; but they are mere naked trustees, and therefore the trust results to the heirs at law and is void. *Southampton* v. *Hertford*, 2 Ves. & B. 64. *Boughton* v. *James*, 1 Colly. Ch. 45.

The court can have no control over this trust for fifty years, as there are no possible objects of the charity interested in it during that time. And savings banks are not allowed by law to take such trusts.

*G. Wheatland*, for Salem Savings Bank.

Gray, J. "Relief of aged, impotent and poor people" is the first charitable use mentioned in the *St.* of 43 Eliz. *c.* 4; and it is not denied that the declared purpose of this testator "to provide and sustain a home for respectable, destitute, aged, native-born American men and women" was strictly charitable, in the eye of the law. But it has been strongly and ably argued that the accumulation directed by the will would prevent the money bequeathed for this object from being used for any purpose whatever until a period more remote than the policy of the law will allow, and that the bequest is therefore void.

The law of perpetuities and accumulations, as applied to individuals, is well settled. By the common law of England

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and of this commonwealth, no estate, legal or equitable, can be created by deed or will, to vest upon the happening of a contingency which may by possibility not take place within a life or lives in being (treating a child in its mother's womb as in being, because in law capable of inheriting) and twenty-one years afterwards. This limit is said to have been adopted by analogy to the ordinary limitations in strict settlement for the life of a tenant in tail and the possible minority of his heir; but the life or lives need not be those of any person interested in the estate, provided only, in the words of Lord Hale, "the candles are lighted all at once;" nor need the term of twenty-one years refer to the infancy of any person whatever. The reason of the rule is that to allow a contingent estate to vest at a more remote period would tend to create a perpetuity by making the estate inalienable; for the title of the first taker would not be perfect, and until the happening of the contingency it could not be ascertained who was entitled, and so the estate could not be alienated, even, as has been said, if all mankind should join in the conveyance. *Brattle Square Church* v. *Grant*, 3 Gray, 142. *Smith* v. *Harrington*, 4 Allen, 566. *Fosdick* v. *Fosdick*, 6 Allen, 41. *Blake* v. *Dexter*, 12 Cush. 570. 2 Spence on Eq. *c.* 2. *Alford's case*, O. Bridgm. 587.

At common law, the power of controlling the rents and profits was coextensive with the power to dispose of the estate which produced them, the limit of the accumulation of annual income was the same as the limit of the creation of future estates, and the enjoyment of the profits could not be suspended for a longer period than the full power of alienating the estate itself. *Thellusson* v. *Woodford*, 4 Ves. 227; *S. C.* 11 Ves. 112. *Hooper* v. *Hooper*, 9 Cush. 122. *Thorndike* v. *Loring*, 15 Gray, . Accumulation even to this extent has been found so inconvenient as to have been still further restrained by statute in England and in some of the United States. The *St.* of 39 & 40 Geo. III. *c.* 98, occasioned by the case of *Thellusson* v. *Woodford*, just cited, and therefore commonly called the Thellusson Act, established narrower limits beyond which no person should by any deed, will, "or otherwise howsoever, settle or dispose of any real or

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personal property" so that the income thereof should be wholly or partly accumulated, except in certain cases, among which charitable trusts were not specified. And Vice Chancellor Shadwell held that a will made since that act, directing an indefinite accumulation for a charitable purpose, could not be carried out in the mode prescribed. *Martin* v. *Margham*, 14 Sim. 230. But as there is no statute upon the subject in Massachusetts, accumulations are here still governed by the rules of the common law.

The rule of public policy, which forbids estates to be indefinitely inalienable in the hands of individuals, does not apply to charities. These, being established for objects of public, general and lasting benefit, are allowed by the law to be as permanent as any human institution can be, and courts will readily infer an intention in the donor that they should be perpetual. 1 Spence on Eq. 588. *Mayor, &c. of Bristol* v. *Whitson*, Dwight's Charity Cases, 171. *Magdalen College* v. *Attorney General*, 6 H. L. Cas. 205. *Perin* v. *Carey*, 24 How. 465. *King* v. *Parker*, 9 Cush. 82. *Dexter* v. *Gardner*, 7 Allen, 246. If an alienation of the estate becomes essential to the beneficial administration of the charity, it may be authorized by a court of chancery. Tudor on Charitable Trusts, 298, and cases cited. *Shotwell* v. *Mott*, 2 Sandf. Ch. 55. *Wells* v. *Heath*, 10 Gray, 27.

Many charitable devises have been defeated in England under the *St.* of 9 Geo. II. *c.* 36, prohibiting alienations or dispositions of land to charitable uses, unless by deed made twelve months and enrolled in chancery six months before the donor's death. But that statute, like some earlier mortmain acts, was wholly English, dictated by considerations of local policy, and did not extend to Scotland, Ireland or the Colonies. Ib. § 6, *ad fin.* Tudor on Charitable Trusts, 94, 96, and cases cited. 4 Dane Ab. 5, 238, 239. 2 Kent Com. (6th ed.) 282, 283. *Perin* v *Carey*, 24 How. 500. The similar provision in the Prov. St. of 28 Geo. II. *c.* 9, passed in the Province of Massachusetts Bay at a time when the influence of England was strongest, was repealed immediately after the Revolution, and has not been reënacted in this commonwealth. *St.* 1785, *c.* 51. *Bartlet* v. *King* 12 Mass. 545. The reasons for maintaining and perpetuating

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charities certainly do not diminish with the abolition of the right of primogeniture, the disuse of entails, and the more equal division and distribution of property.

If a devise in fee for the benefit of a charity is accompanied by an executory devise over to individuals upon the happening of a contingency which may possibly not occur within the time prescribed by the rule against perpetuities, the devise over is void, for the reason that until the contingency happens it cannot be ascertained in whom the title will be. *Well* v. *Heath*, 10 Gray, 25, 26. And if a gift is made in the first instance to an individual, and then over, upon a contingency which may not happen within the prescribed limit, to a charity, the gift to the charity is void, not because the charity could not take at the remote period, but because it tends to create a perpetuity in the individual who is the first taker, by making the estate inalienable by him beyond the period allowed by law. *Company of Pewterers* v. *Christ's Hospital*, 1 Vern. 161. *Commissioners of Donations* v. *De Clifford*, 1 Drury & Warren, 254. Within the same class fall cases of gifts of an annuity to A. and his heirs, or of personal property to A. and the heirs of his body, and then over to a charity, in which the gifts over have been held void as too remote. *Attorney General* v. *Gill*, 2 P. W. 369. *Attorney General* v. *Hall*, W. Kel. 13. The decision in *Attorney General* v. *Gill* indeed can hardly be maintained upon the facts stated in the report, inasmuch as in that case A. died before the testator, so that the estate, according to modern decisions, would seem to have vested immediately in the charity. *Burbank* v. *Whitney*, 24 Pick. 146. 1 Jarman on Wills, (4th Amer. ed.) 256, 257.

But a gift may be made in trust for a charity not existing at the date of the gift, and the beginning of whose existence is uncertain, or which is to take effect upon a contingency which may possibly not happen within a life or lives in being and twenty-one years afterwards, provided there is no gift of the property meanwhile to or for the benefit of any individual or any private corporation. In the case of Downing College, a gift to trustees to buy ground, obtain a royal charter and

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found the college, was established twenty years after the testator's death by Lord Northington and Lord Camden, after taking the opinion of Lord Chief Justice Wilmot and Sir Thomas Sewell, M. R.; followed up by decrees of Lord Loughborough thirty years later, after five unsuccessful applications to the crown for a charter; and a charter was not in fact obtained until more than fifty years after the death of the testator, after which further directions in the cause were made by Lord Eldon. *Attorney General* v. *Downing*, Wilmot, 1; *S. C.* Dick. 414; Ambl. 550, 571. *Attorney General* v. *Bowyer*, 3 Ves. 714; *S. C.* 5 Ves. 300; 8 Ves. 256. So Lord Thurlow held that a legacy for the purpose of establishing a bishop in America was good, although none had yet been appointed. *Attorney General* v. *Bishop of Chester*, 1 Bro. C. C. 444. In *Inglis* v. *Sailors' Snug Harbor*, 3 Pet. 99, a devise and bequest in trust out of the rents and profits to build a sailors' hospital as soon as the trustees should judge that the proceeds of the estate would support fifty or more sailors, (first obtaining an act of incorporation, if necessary,) and to use the income of the property forever for supporting the hospital and maintaining sailors therein, was sustained by the supreme court of the United States; and although there was some difference of opinion among the judges upon other points, none of them expressed any doubt of the validity of the disposition upon the ground of remoteness. And in *Sanderson* v. *White*, 18 Pick. 336, Chief Justice Shaw said, "When a gift is made with a view to found a hospital or college, not in being, and which requires a future act of incorporation, the gift is nevertheless valid, and the law will sustain it and carry it into effect."

Upon this principle it has been held in England that if a gift is made to one charity in the first instance, and then over to another charity upon the happening of a contingency which may not take place within the limit of the rule against perpetuities, the limitation over to the second charity is good, because no individual is concerned, and no private use involved; the estate is no more perpetual in two successive charities than in one charity; and so the law against perpetuities and remoteness has

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no application, and there is nothing to restrain the donor from affixing such limitations and contingencies, in point of time, to his charitable gift, as he pleases. *Society for Propagation of the Gospel* v. *Attorney General*, 3 Russ. 142. *Christ's Hospital* v. *Grainger*, 16 Sim. 100; *S. C.* 1 Macn. & Gord. 464; 1 Hall & Twells, 539. A similar decision has been made by the supreme court of the United States under the civil law as established in Louisiana. *McDonough* v. *Murdoch*, 15 How. 367.

We are thus brought to the question, how far the rule of law limiting the period of accumulation applies to charitable gifts. Any directions for accumulation for the benefit of individuals until the happening of a contingency which by possibility may not take place within the period prescribed by the rule against perpetuities are void. But there are many cases in which the law has been assumed to be different as applied to charities.

In 1788 Ralph Bradley, an eminent lawyer, made his will, by which he gave his personal property in trust to pay £500 a year for twenty years from the end of three years after his death, and then £1000 a year until the 5th of January 1860, or seventy years after his death, and then the whole income of the accumulated fund, to purchase such books, to be disposed of in Great Britain or the British dominions, as might have a tendency to promote the interests of virtue and religion and the happiness of mankind. Lord Thurlow held this too indefinite in its objects to be established as a charity. But neither he, nor Sir William Grant nor Lord Eldon, when expressing grave doubts of the correctness of that decision, ever doubted the lawfulness of the direction for accumulation, although the time of accumulation was mentioned in the argument before Sir William Grant, and Lord Eldon expressly referred to the fact that Mr. Bradley's intention was that the fund should be accumulated for many years. *Browne* v. *Yeall*, 7 Ves. 50 *n.*; *S. C.* cited in 9 Ves. 403, 406, and 10 Ves. 27, 534, 539.

In one case indeed the house of lords, upon the advice of Lord Wynford, held that a gift of property to accumulate until it should amount to the sum of pounds sterling, and then

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to be employed in erecting and maintaining a hospital for the support, clothing and education of boys, was void. *Ewen* v. *Bannerman*, 2 Dow & Clark, 74; *S. C. nom. Ewen* v. *Magistrates of Montrose*, 4 Wilson & Shaw, 346. But that case, according to the opinions of Lords Chelmsford and Wensleydale, is to be supported (if it can be supported at all) upon the ground that the blanks left the gift too incomplete and uncertain to be carried into execution. *Magistrates of Dundee* v. *Morris*, 3 Macqueen, 154, 155, 174. See also *Henshaw* v. *Atkinson*, 3 Madd. 310, 313; *Philpott* v. *St. George's Hospital*, 6 H. L. Cas. 359, 360, 369; *Inglis* v. *Sailors' Snug Harbor*, above cited; *District Attorney* v. *Cushing*, 2 Cush. 519.

Count Rumford in 1796 gave the sum of five thousand dollars to the American Academy of Arts and Sciences in trust to pay the interest biennially as a premium to the author of the discovery or improvement on heat or light, most beneficial to mankind, which should be published in America during the two years next preceding, and directed that, as often as there should be no such discovery or improvement deserving the premium in the opinion of the trustees, the amount should be added to the principal, and the subsequent premiums proportionally augmented, without restriction. No discoveries or improvements within the terms of the gift were made for more than forty years, the fund increased to fourfold the original amount, and the donor's residuary legatees claimed the whole fund, or at least the surplus accumulation. But Chief Justice Shaw held that the American Academy was entitled to the whole fund and its accumulations, and adopted a scheme for promoting the general intent of the donor. *American Academy* v. *Harvard College*, 12 Gray, 582.

John Hawes, who died in 1829, by his will devised real estate in trust to apply the income forever to the support of public schools and of a Congregational religious society in South Boston, and directed that when the income should have so increased and accumulated as in the opinion of the trustees to answer these purposes, the surplus should be appropriated to the establishment of a second Congregational society, the settlement and

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support of a minister, and the erection and maintenance of a house of public worship for that society, and to the support and encouragement of such other seminaries of learning, and in such way as the trustees should think most for the honor of God and the good and happiness of the inhabitants of South Boston and their posterity. The probate of the will was opposed, among other grounds, because the will was void as creating perpetuities and indefinite and useless accumulations. But this court, in an opinion delivered by Mr. Justice Wilde, held that it could not, sitting as the supreme court of probate, examine that question. Twenty years later, upon a bill in equity by the First Congregational Society claiming more than the trustees had seen fit to allow to that society out of the accumulations in their hands, this court, speaking through the same judge, without doubting the validity of the devise, said that the surplus income amounted only to $650, "which must be allowed to accumulate for a long time, before it will be sufficient to support a minister in a second Congregational society, and to erect a house of public worship, and to fulfil the intentions of the testator as to the other uses and purposes provided for in the said clause of the will." *Hawes* v. *Humphrey*, 9 Pick. 350, 355, 362. *Hawes Place Congregational Society* v. *Trustees of Hawes Fund*, 5 Cush. 454.

Oliver Smith bequeathed money to trustees to be managed as an accumulating fund for the term of sixty years, and then to be paid over to the town of Northampton to establish agricultural institutions for the instruction of farmers. And this court held that that town, by virtue of its right to receive this charitable gift at the end of sixty years, had an interest in the estate, and could appeal from a decree of the judge of probate respecting the probate of the will. *Northampton* v. *Smith*, 11 Met. 390.

In a very recent case, a testator gave a piece of land and one thousand dollars, after the death of his wife, in trust to maintain a school-house and school, and added, "In order to accomplish said object, said trustee and his heirs shall have reasonable time to bring the same about with the funds left for that purpose." Twenty years after the death of the testator, and eight after the death of his widow, the school not having been established, the

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residuary devisees and legatees brought a bill in equity against the trustee to recover the land and money; but it appearing that the trustee was diligently endeavoring to increase the fund in his hands by causing it to accumulate until it should be sufficient to effect the purpose of the testator, the court dismissed the bill. *Tainter* v. *Clark*, 5 Allen, 66.

Dr. Franklin, who died in 1790, left legacies of £1000 sterling to each of the cities of Boston and Philadelphia to be lent to young married artificers, with sureties, and to be repaid by yearly instalments of one tenth, with interest, and directed that this should go on for one century, and with a part of the fund for another century, at the expiration of which he gave the principal to the city and the commonwealth. In 1827 Chief Justice Gibson spoke of this bequest of money to the city of Philadelphia, to be lent to young mechanics, as belonging to a class of charities, the validity of which had never been questioned. *Witman* v. *Lex*, 17 S. & R. 91. Many years afterwards the same learned judge expressed an opinion that a similar bequest was void, upon the ground that charities were subject to the ordinary rule limiting accumulations. *Hillyard* v. *Miller*, 10 Penn. State R. 326. This opinion excited surprise in Pennsylvania; and it has since been overruled in the same court, and the decision of the case in which it was delivered sustained upon the ground that such loans constituted no charity. Hill on Trustees, (3d Amer. ed.) 455 *n.* *Philadelphia* v. *Girard*, 45 Penn. State R. 1. It is not within the scope of our present inquiry to consider whether this last position can be maintained. See *St.* 43 Eliz. *c.* 4, § 1; Duke, (Bridgman's ed.) 131; *Attorney General* v. *Ironmongers' Co.* Coop. Pract. Cas. 283; *Zimmerman* v. *Anders*, 6 Watts & S. 220, 221.

In this state of the authorities, and in the absence of any legislation upon the subject, we are not prepared to say that accumulation for a charitable purpose can in no case be allowed for a fixed period of more than twenty-one years, or for a contingent period beyond a life or lives in being and twenty-one years afterward. In principle, the uncertain duration of a life or lives in being would seem to have no natural relation to a

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permanent charity. And the justice or policy of a rule is not apparent, which would prevent a person charitably disposed, but whose property is not large enough to carry out his charitable intent by an accumulation of twenty-one years, from founding a charity, except through the indirect measure of a life or lives in being; especially when the period of accumulation which he needs or selects is one much within the average duration of accumulation under the common rule. The objection that accumulation for a charitable purpose, unless governed by the common rule, might go on indefinitely, would certainly be entitled to grave consideration before finally determining what the limit is. It is possible that the power of a court of chancery over charities might enable it to so modify the donor's particular directions as to carry out his general charitable intent without violating any rule of public policy, if a case should arise in which those directions and that policy were in danger of coming into conflict. But it is not necessary for the decision of this cause to define the limit of lawful accumulation for charitable purposes.

The duties imposed by the testator upon his executors in this regard are to pay annually out of the income of the real estate two hundred dollars to the widow of his deceased brother for life, and one hundred dollars to the trustees of the Salem Savings Bank for fifty years, and after deducting these payments annually, to divide the remaining income among his brother's children, and at the expiration of the fifty years to divide the remainder of the estate among his brother's grandchildren. The annuity of one hundred dollars yearly for fifty years is payable at fixed times, subject to no contingency, and, independently of the direction for accumulation, would be open to no legal objection if the annuitant were an individual. The intention to devote these sums to the charitable purpose of supporting aged and destitute persons is manifest. Each sum paid is separated from the bulk of the estate, and vested in the trustees appointed to receive it, as soon as the payment is made, and before the intended accumulation of the interest upon it begins.

Even a gift to an individual, which on a fair construction

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vests within the period allowed by law, is held valid, although accompanied by a void direction for accumulation. *Josselyn* v *Josselyn*, 9 Sim. 63. *Blease* v. *Burgh*, 2 Beav. 221. *Saunders* v. *Vautier*, 4 Beav. 115; *S. C.* Craig & Phillips, 248. *Peard* v. *Kekewich*, 15 Beav. 166. *Lane* v. *Lane*, 8 Allen, 350. The reasons are much stronger for not allowing illegal directions for the accumulation or management of a fund, devoted to charitable purposes, to defeat the gift, and for carrying out the scheme of the testator as far as the law will allow, if it cannot be followed to its full extent. *Attorney General* v. *Caius College*, 2 Keen, 163. *Martin* v. *Margham*, 14 Sim. 230. *Thompson* v. *Thompson*, 1 Colly. R. 388, 400. *Attorney General* v. *Greenhill*, 33 Beav. 193. *Attorney General* v. *Pyle*, 1 Atk. 435. *Attorney General* v. *Catherine Hall*, Jacob, 395. *Magistrates of Dundee* v. *Morris*, 3 Macq. 134. *Baker* v. *Smith*, 13 Met. 41. *Drury* v. *Natick*, *post*, 169. It is generally stated in the English books that a direction to accumulate income for a period beyond that allowed by the common law is wholly void. 2 Spence on Eq. 181, 182. Lewin on Trusts, (3d ed.) 111, and cases cited. But perhaps, in the case of property set apart in the hands of trustees for a charitable purpose, each annual addition of the income to the principal might be treated as distinct, and the accumulation held good for twenty-one years at least, if not beyond that time. And see *Phipps* v. *Kelynge*, 2 Ves. & B. 57 *n.*, 62, 63 *n.*

It was contended for the heirs at law that no title, legal or equitable, would vest in the charity until the expiration of the fifty years. But we think such is not the true construction of the will. The clause relied on is as follows: "At the expiration of fifty years the sum which shall have accumulated shall be appropriated by a society of ladies from all the Protestant religious societies in Salem to provide and sustain a home for respectable destitute aged native-born American men and women." Here are no words of transfer of title, and the ladies mentioned are not a corporation capable of taking the legal estate. The more reasonable interpretation is that the testator intended to continue the title of the fund in the hands of the trustees to whom he gave it in the first instance, and to clothe the proposed

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society of ladies with visitatorial powers as managers of the charity. What those powers may be we have no occasion now to decide; it is enough to say that the will does not transfer the title from the trustees to them.

Neither is it necessary to consider whether the trustees of the Salem Savings Bank are authorized by law to hold a fund for this purpose; inasmuch as they have declined the trust, and asked to have another trustee appointed in their stead, which there is no doubt of the authority of the court to do. *Bliss* v. *American Bible Society*, 2 Allen, 337. *Reeve* v. *Attorney General*, 3 Hare, 191. Upon the appointment of such a trustee, it will be the duty of the executor to pay to him the annuity of one hundred dollars annually for fifty years, according to the will. If, acting with good fidelity and discretion, the funds accumulate in his hands, the accumulations will certainly belong to the charity. *Aylet* v. *Dodd*, 2 Atk. 238. *Attorney General* v. *Bowyer*, 3 Ves. 728, 729 *n.*; *S. C.* 5 Ves. 301. *Society for Propagating the Gospel* v. *Attorney General*, 3 Russ. R. 142. *Forbes* v. *Forbes*, 18 Beav. 552. *American Academy* v *Harvard College*, above cited. *Tainter* v. *Clark*, 5 Allen, 69 Any question of law which may hereafter arise in the administration of the charity may be determined upon a bill filed by the trustee to obtain the instructions of the court, or upon an information by the attorney general, if necessary, in behalf of the public. *Decree accordingly.*

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SMITH TITCOMB & others *vs.* TIMOTHY P. MORRILL & others.

A voluntary conveyance, absolute in form, even though aided by an oral agreement of the grantee to hold the premises for the benefit of the grantor, raises no trust in favor of the grantor which can be enforced in this commonwealth.

CHAPMAN, J. The bill alleges that the female plaintiffs are the children and sole heirs of David Morrill, deceased; that in the year 1839 said David made a quitclaim deed of the house

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and land described in the bill to Timothy P. Morrill, his brother that there was no valuable consideration paid for said deed; that the land was conveyed in trust, for the benefit of said David and his heirs, on account of his intemperate habits at that time, said David having been prevailed upon to make such conveyance partly by promises and partly by threats. The bill then states the value of the property, the occupation of it by David during his lifetime, and by his heirs since his death, without payment of rent; that it was not the intention of said Timothy P. to avail himself of his legal title against said David or his heirs; and that he held it and meant to hold it in trust for their benefit. It then alleges the pendency of an action at law by the defendants to recover possession of the property, and prays for an injunction against the prosecution of the action at law, and a decree that the defendants shall give up and renounce the trust, and convey the premises to the plaintiffs; that an account may be stated between the parties, with an offer to pay whatever may be due from the plaintiffs, and concludes with a prayer for general relief.

The defendants' answer denies the trust, the want of consideration and the threats, and claims an absolute title under the deed to Morrill, their ancestor; and under the 28th rule, authorizing a defendant in his answer to insist on any special matter and have the same benefit as if he had pleaded or demurred to the bill, it states as special matter: 1. That the bill is founded upon an alleged trust, and the trust is not stated or described with such distinctness that the court can ascertain it or enforce it; 2. That the trust is not alleged to arise or result by implication of law, nor to have been created or declared by any instrument in writing signed by the party declaring or creating the same, as required by the statute; 3. They plead the statute of frauds in bar, and allege that the trust was not created or declared by any instrument in writing.

In a plea in bar subsequently filed, they allege that judgment has been recovered by them against the plaintiffs in the action at law. But it is not material to consider the validity or propriety of this plea.

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The bill alleges a trust concerning lands. By Gen. Sts. *c.* 100, § 19, "no trust concerning lands, except such as may arise or result by implication of law, shall be created or declared, unless by an instrument in writing signed by the party creating or declaring the same, or his attorney." This is different from the English statute, which does not require the trust to be declared in writing, but only manifested and proved in writing. It is not necessary in this case to decide whether this difference of phraseology is material. Nor is it necessary to decide whether a bill brought to enforce an express trust concerning lands must aver that it was created or declared in writing. The authorities on that point are somewhat conflicting. If it had been intended by the plaintiffs' solicitor that the bill should allege an express trust, it would be defective on another ground. By Rule 4, it is required that the bill shall contain a clear and explicit statement of the plaintiffs' case. This bill does not contain a clear and explicit statement of an express trust. But though its language is loose and general, it is apparently intended to contain a statement of an implied trust. It alleges that the deed of conveyance was a quitclaim, which without further description implies an absolute and unconditional deed. It does not set forth any agreement of the grantee. The promises connected with the threats of which it speaks must be understood as verbal and general, and not as constituting an express trust. The prayer for a decree that the defendants shall give up and renounce the trust and convey the land to the plaintiffs seems to regard it as a trust arising or resulting by implication of law. The plaintiffs' counsel has argued the case upon the ground that the bill sets forth such a trust, and has not contended that there was an express trust within the statute.

Regarding the bill, then, as setting forth a trust arising or resulting by implication of law, the plaintiffs' position is, that the conveyance without consideration, aided perhaps by a parol agreement, raises a trust by implication of law in favor of the grantor such as this court can enforce. No authority is produced to sustain this position; and the case of *Bartlett* v. *Bartlett* 14 Gray, 278, is a recent authority to the contrary. It is



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unlike the cases referred to in Adams on Equity, cited by the plaintiffs' counsel. The most numerous class of these cases is where a purchase is made in the name of one person, and the purchase money is paid by another. None of these are cases where a grantor has been held to be *cestui que trust* on the ground that the consideration was not paid, or that there was a parol understanding that the grantee should hold the land in trust for him.

*Demurrer sustained; bill dismissed with costs.*

*C. Lamson*, for the plaintiffs, being first called on, cited Adams on Eq. (3d Amer. ed.) 31–37, 303; 4 Kent Com. (6th ed.) 308.

*S. B. Ives, Jr.*, for the defendants, cited Gen. Sts. *c.* 100, § 19; *Hunt* v. *Moore*, 6 Cush. 1; *Steere* v. *Steere*, 5 Johns. Ch. 1; *Maccubbin* v. *Cromwell*, 7 Gill & J. (Md.) 157; *Pinney* v. *Fellows*, 15 Verm. 525.

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## Osmon Jones *vs.* Inhabitants of Andover.

In an action to recover damages for an injury sustained by reason of a defective way, the defendants may prove that the plaintiff, at the time of receiving the injury, was travelling in violation of the statutes for the observance of the Lord's day, without specially averring that as a ground of defence in the answer.

A person cannot legally travel on the Lord's day for the purpose of supplying fresh meat to marketmen, whom his master has agreed to supply therewith, although he could not do this, in addition to his other work, on Monday morning, and his master, by reason of illness, is unable to do it himself.

Tort to recover damages for an injury received by reason of a defective highway. The answer denied the existence of a defect in the highway, and that the plaintiff was using due care at the time of receiving the injury.

At the trial in the superior court, before *Morton*, J., it appeared that the plaintiff's injury was received on Sunday, while he was carrying fresh meat from North Reading, where he resided, to Lawrence, a distance of twelve miles. The defendants objected that the plaintiff could not recover, because he was travelling illegally, and so was not using due care. The plaintiff contended

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that this ground of defence was not open under the answer; but the judge ruled otherwise. The plaintiff then offered to prove that he was the only servant of one Eames, of Reading; that Eames was under contract to supply certain marketmen in Lawrence, and also others in Stoneham, with fresh meat for their daily customers, as needed; that the stock of one of Eames's customers in Lawrence had become exhausted on the Saturday before the accident; that Eames had been taken sick a day or two before, and was then confined to his bed; that the plaintiff, as Eames's servant, was called on to furnish meat to this customer; that Eames was bound to furnish meat at Stoneham early on Monday morning; that the plaintiff could not carry the meat to Lawrence, unless on Sunday night, and so told the marketman from Lawrence, who replied that the meat must be furnished, as there was nothing else with which to supply his Monday customers; that in order to supply these customers with meat for Monday it was necessary, on account of Eames's sickness, for the plaintiff to carry it to Lawrence on Sunday night; that he accordingly started on Sunday evening after sundown, and was travelling to Lawrence upon this errand when the accident happened; and that, at that season, fresh meat, in order to be fit for food on Monday, should be slaughtered and dressed on Sunday. The judge ruled that these facts, if proved, would not entitle the plaintiff to recover, and a verdict was accordingly returned for the defendants. The plaintiff alleged exceptions.

*D. Saunders, Jr.*, for the plaintiff.

*S. B. Ives, Jr., & S. Lincoln, Jr.*, for the defendants.

Bigelow, C. J. It is too clear to admit of discussion, that the act of the plaintiff in travelling on the Lord's day was not within the exception of the statute, (Gen. Sts. *c.* 84, § 2,) as being justified by necessity or charity. He was, at the time of the accident, in the pursuit of a secular business, carried on for purposes of profit and gain, and the temporary inconvenience which might have been caused by his failure to supply provisions on Monday to those persons who usually dealt with his principal falls far short of proving any such exigency as would

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warrant a jury in finding that the plaintiff was lawfully on the highway at the time when the accident happened. *Bennett* v *Brooks*, 9 Allen, 118.

The more difficult question arises on the state of the pleadings. The unlawful act of the plaintiff in travelling on the Lord's day is not alleged in the answer. No averment whatever is made as a distinct ground of defence. The case is at issue solely on a denial of the averments in the declaration. Of these, the only one which can be said to include the fact that the plaintiff was lawfully on the highway at the time of the accident is, that he was travelling thereon, "using due care." If the traverse of this averment properly put in issue the legality of the plaintiff's act in using the highway on the Sabbath, then it is clear that the case was rightfully submitted to the jury, and the verdict cannot be disturbed.

The term "due care," as usually understood in cases where the gist of the action is the negligence of the defendant, implies not only that a party has not been negligent or careless, but that he has been guilty of no violation of law in relation to the subject matter or transaction which constitutes the cause of action. Thus, in an action brought against a railroad corporation for a collision at the crossing of a highway, evidence that the defendants omitted to ring the bell of the engine or to sound the whistle, as required by law, would be competent evidence in support of the allegation of a want of due care. So in case of a collision of two vehicles on a highway, evidence that the plaintiff was travelling on the left side of the road, in violation of the statute, when he met the defendant, would be admissible to show negligence. In such cases, evidence that a party is guilty of a violation of law supports the issue of a want of proper care; nor can it be doubted that in these and similar actions the averment in the declaration of the use of due care, and the denial of it in the answer, properly and distinctly put in issue the legality of the conduct of the party as contributing to the accident or injury which forms the groundwork of the action. No specific averment of the particular unlawful act which caused or contributed to produce a result could, in such cases, be deemed

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necessary. We are unable to see that a different rule is applicable to the case at bar. It is true that no direct unlawful act or omission or commission by the plaintiff, done at the moment when the accident happened, and tending immediately to produce it, is offered to be shown in evidence. But it is also true that if the plaintiff had not been engaged in the doing of an unlawful act the accident would not have happened, and the negligence of the defendants in omitting to keep their road in proper repair would not have contributed to produce an injury to the plaintiff. It is the disregard of the requirements of the statute by the plaintiff which constitutes the fault or want of due care which is fatal to the action. In this aspect, it is clear that no averment of such illegal conduct was necessary to enable the defendants to avail themselves of it as a ground of defence to this action. It was a substantive fact included in the averment of due care in the declaration, and sufficiently put in issue by the denial in the defendants' answer. It is only when the defendant relies on some substantive distinct fact, not alleged by the plaintiff or included in the averments in the declaration, that it is necessary to set it forth in the answer. *Granger* v. *Ilsley*, 2 Gray, 521. *Mulry* v. *Mohawk Valley Ins. Co.* 5 Gray, 541. The case of *Bosworth* v. *Swansey*, 10 Met. 363, fully supports the view which we have taken of the pleading in this action. That was an action like this, to recover damages for a defect in a highway. The defence was, as here, that the plaintiff was unlawfully travelling on the road on the Lord's day. The court determined that it was incumbent on the plaintiff to prove that he was lawfully travelling, from necessity or for purposes of charity, and it was distinctly held that the case fell within the principle which, in such cases, renders it necessary for the plaintiff to prove that he was in the use of due care, to entitle him to recover damages. It is never necessary that a defendant should allege in his answer any facts which it is the duty of the plaintiff to prove in support of his case, before the defendant can be called on for the grounds of his defence.

We have assumed that the allegation of the use of due care by the plaintiff at the time of the accident, comprehends the

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fact that the plaintiff was then lawfully on the highway. Such, we think, is the reasonable construction of the form of declaration prescribed in the forms annexed to the practice act, Gen. Sts. *c.* 129; otherwise, it would seem that a material fact, which it was the duty of the plaintiff to prove, was not included in the statute form of pleading. But if it were not so, it would not change the result. If it is not necessary to aver the fact in the declaration, it certainly cannot be required of the defendant to deny its existence, or make any averment respecting it, in the answer. It has already been determined that an omission to deny in an answer a fact necessary to the maintenance of the action, but not alleged in the declaration, is not to be deemed an admission of such fact. *Tarbell* v. *Gray*, 4 Gray, 444. On the same ground, a defendant need not traverse such fact, or make any averment respecting it, if the plaintiff does not allege it in his declaration. *Exceptions overruled.*

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ANDREW J. PERKINS *vs.* WILLIAM F. PARKER & another.

If the demandant in a real action has failed, and judgment has been rendered against him, for the sole reason that his grantor was disseised at the time of delivering the deed to him, and he has subsequently fortified his title in this respect, he may, in a new action against the same party to recover the same premises, prove by parol evidence that the former judgment was rendered solely upon that ground, although there was another ground of defence, concerning which evidence was offered on both sides.

WRIT OF ENTRY to recover a piece of land in Andover. The tenants pleaded *nul disseisin*, and specified in defence a former judgment in their favor in a writ of entry brought against them by the demandant, to recover the same premises.

At the trial in the superior court, before *Lord*, J., the demandant put in evidence, as a part of his chain of title, a deed of Caleb Saunders to Alfred D. Holt, dated February 1st 1859 and recorded July 24th 1863, and a deed from Holt to himself, dated July 21st 1863, and also another deed from Holt to himself, dated May 23d 1864, which last deed was delivered upon the premises. The tenants then put in evidence a deed of Caleb

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Saunders to themselves, dated September 16th 1862, and recorded on the same day; and also the record of the former judgment, set forth in the specification, by which it appeared that the cause was tried by the court, without a jury, and judgment rendered for the tenants at June term 1864. The demandant thereupon offered to show that the tenants, when they took the deed from Saunders, had notice of the prior unrecorded deed to Holt, and also offered parol testimony that, at the hearing of the former suit, the presiding judge found this fact of notice in favor of the demandant, and based his finding for the tenants upon the ground that Holt was disseised at the time of his deed to the demandant. This evidence was objected to, and thereupon the tenants were allowed, under objection, to show that at the former trial evidence was offered by both parties upon the question of notice of the unrecorded deed. This fact being shown, the judge rejected the evidence offered by the demandant, and directed a verdict for the tenants, which was accordingly rendered. The demandant alleged exceptions.

*N. W. Harmon*, for the demandant, cited *Sawyer* v. *Woodbury*, 7 Gray, 499, and cases cited; *Merriam* v. *Whittemore*, 5 Gray, 317, and cases cited; *Burke* v. *Miller*, 4 Gray, 114; *Sargent* v. *Fitzpatrick*, Ib. 511, and cases cited; *McDowell* v. *Langdon*, 3 Gray, 513; *Harding* v. *Hale*, 2 Gray, 399; *Dutton* v. *Woodman*, 9 Cush. 255; *Gilbert* v. *Thompson*, Ib. 348; *Kent* v. *Gerrish*, 18 Pick. 564, and cases cited.

*S. B. Ives, Jr.*, for the tenants. If any question of fact is involved in the issue presented by the pleadings in a former suit between the same parties, and such fact appears to have been actually litigated, a verdict is conclusive evidence, and the party against whom such fact is apparently found is estopped to plead or offer evidence against such finding. *Smith* v. *Whiting*, 11 Mass. 445. *Sawyer* v. *Woodbury*, 7 Gray, 499. The last case is directly in point. The deed to the demandant of May 1864 is not a subsequently acquired title, within the legal meaning of those words, as applied to the subject matter.

Dewey, J. In answer to the defence that the title to the demanded premises has been settled by a judgment in a former

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suit between these parties, it was competent, upon this record of the proceedings in the former suit, for the demandant to introduce parol evidence to satisfy the jury that there were two distinct grounds of defence relied upon, one of which involved only the question whether his grantor was seised, at the time of the making and delivery of the deed to him, and that this ground of defence was established by the proof, and that for this cause solely the judgment was rendered in favor of the tenants, and not by reason of any defect in the title of his grantor.

These facts being shown, the further fact that another distinct ground of defence was also taken, involving the question of notice of an unrecorded prior deed from Caleb Saunders to A. D. Holt, and in reference to which evidence was offered, does not make such former judgment a bar to the present action, if it shall appear that the question of notice was not passed upon, or that, if passed upon, it was found that such notice was given, and that the judgment for the tenants was rendered solely upon the ground that the grantor of the demandant was disseised when he executed the deed. In such case, the present demandant may introduce evidence of a newly acquired title by deed duly delivered since the commencement of the former suit, and then proceed to establish title in his grantor.

The effect to be given to a former judgment rendered in a case where there were two independent grounds of defence, and either of them, if established, would be fatal to the plaintiff, was considered, and the rule that we have applied to this case recognized, in *McDowell* v. *Langdon*, 3 Gray, 513.

We cannot suppose that any different rule was intended to be sanctioned by the case of *Woodbury* v. *Sawyer*, 7 Gray, 499. There is nothing contradictory to it in the opinion in that case, upon the exceptions taken at the first trial. The final disposition of it, briefly stated, must be assumed to have been intended to be in harmony with the opinion which had been previously announced, and which had recognized the cases of *Dutton* v *Woodman*, 9 Cush. 255, and *McDowell* v. *Langdon*, *supra*, as authorities. *Exceptions sustained.*

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## Albert W. Stevens *vs.* Inhabitants of Boxford.

This court cannot decide on a bill of exceptions that riding a safe horse on a dark night, bareback and without martingales, over a familiar road, by a person accustomed to the use of horses and to that horse, and turning out upon meeting a carriage, show such want of ordinary care as to prevent a recovery for an injury sustained by reason of a defective highway.

In an action against a town to recover for a personal injury sustained by the plaintiff, while riding on horseback upon a highway, by going off a bank where there was no railing, the defendants asked the court to instruct the jury that if the plaintiff's horse passed the bank wall in safety, and, while proceeding in the adjoining field, stepped on ice and slipped down and thus injured the plaintiff, he could not recover. The judge gave this instruction, and added that if the horse, by reason of the want of a railing, went over the bank wall, and immediately and while under the same impulse or impetus slipped on ice in the field and fell, thereby injuring the plaintiff, the town would be liable. *Held*, that the defendants had no ground of exception.

Tort to recover for a personal injury sustained by reason of a defective highway.

At the trial in the superior court, before *Morton*, J., the plaintiff introduced evidence tending to prove that he was twenty-seven years old, and had lived in Boxford, at the house of Thomas Sawyer, for eighteen years; that he had always been in the habit of driving horses; that on the evening of February 11th 1863, a horse of Sawyer's got away, and he thereupon mounted a gray colt bareback, and without martingales, to go after him; that the colt was gentle, and he had frequently driven him and ridden him bareback, though not without martingales; and that while going on the road five or six miles an hour, the evening being very dark, he heard a carriage coming, and turned out, and immediately found himself over the bank and injured in his foot. Several witnesses called by the plaintiff testified to the tracks of the horse at and near the place where he went off, and to the condition of the road. The plaintiff and the persons in the carriage were unable to testify precisely where or how the injury occurred.

The defendants asked the court to rule that there was no sufficient evidence of due care on the part of the plaintiff; but the judge declined so to rule. The defendants contended that the injury occurred by reason of the plaintiff's foot coming in

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contact with the wheels of the carriage, and that he was thereby thrown upon the road, the horse only going off the bank; and that, if the injury did not occur in that manner, the horse passed safely over the bank, and after that, while proceeding in the adjoining field, stepped on ice and fell and caused the injury. After the conclusion of the charge, the defendants requested the judge further to instruct the jury that "if the horse passed the bank wall in safety, and while proceeding in the adjoining field stepped on ice, slipped down and thus injured the plaintiff, he could not recover." The court gave this instruction, and added, that "if the horse, by reason of the want of a railing, went over the bank wall, and immediately and while under the same impulse or impetus slipped on ice in the field and fell, thereby injuring the plaintiff, the town would be liable."

The jury returned a verdict for the plaintiff, with $1250 damages; and the defendants alleged exceptions.

*S. B. Ives, Jr.*, for the defendants.

*J. B. Lord*, for the plaintiff, was not called upon.

CHAPMAN, J. The first exception is to the ruling of the presiding judge, that the evidence offered by the plaintiff tending to prove due care on his part was sufficient in law to be submitted to the jury. The court are of opinion that this ruling was correct. The evidence tended to show that he understood how to manage a horse, and that the horse he rode was gentle and safe; and the facts proved as to the darkness of the night, the condition of the road, the turning out for the purpose of passing the carriage which he met, the place where the accident occurred, and the tracks which were seen afterwards, were sufficient to enable a jury of practical men to judge whether he used such reasonable care as the circumstances required, even though he was unable to tell precisely how and where the accident occurred. The court cannot see judicially that the jury erred in finding for the plaintiff on this point.

The only other exception which is insisted on relates to the rulings made by the judge after the defendants had made their request for instructions. These appear to be sufficiently favorable to them. Under them the jury must have found that the

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injury to the plaintiff was caused solely by the defect; and if this were so, it could not be essential that they should be able to determine the precise place in the road where it occurred, or the precise manner in which it occurred. And if the horse by reason of the want of a railing went over the bank, and immediately and while under the same impulse or impetus that carried him over slipped on the ice in the field and fell, thereby injuring the plaintiff, this defect must be regarded as the proximate cause of the injury. The case of *Palmer* v. *Andover*, 2 Cush. 600, sustains this view, though the injury was not received within the limits of the highway; and the case of *Sparhawk* v. *Salem*, 1 Allen, 30, where the plaintiff had proceeded a considerable distance before the injury happened, is clearly distinguishable from this case. *Exceptions overruled.*

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NATHANIEL H. BANFIELD & another *vs.* HORACE WHIPPLE & another.

If a horse is let to A. and delivered by the owner to B., upon the credit of A., and the horse is driven to death by B. with the assent and aid of A., who is driving another horse near by, both may be held jointly liable to the owner.

Evidence that an original charge on books of account was made to one person is not conclusive evidence that the contract was made with him or on his credit.

In an action to recover damages for an injury to a hired horse, by immoderate driving, evidence is competent to prove that the defendant, immediately after the injury charged, made an assignment of all his property.

TORT against Horace Whipple and James Rowell. The writ was dated August 8th 1863. The second count in the declaration was as follows: "And the plaintiffs further say that the said Whipple hired of them a certain horse and carriage to drive in a moderate and proper manner; and the said Whipple agreed to return said horse to the plaintiffs in good order and condition. Yet the said Whipple, wholly regardless of his duty and undertaking in the premises, delivered said horse to said Rowell to drive, and the said Rowell improperly and immoderately drove said horse to Lowell and beyond said Lowell

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to wit, to Tyngsboro and Hudson; and the said Whipple aided and assented to said immoderate driving, by reason of which immoderate driving the said horse was killed by the said Whipple and Rowell, and the said Whipple never returned the said horse to the plaintiffs, but on the contrary with said Rowell, by reason of said immoderate driving, killed said horse." The defendants answered separately.

At the trial in the superior court, before *Morton*, J., it appeared that the defendants had arranged to take a pleasure excursion together on August 6th 1863, and on the morning of that day they started from Lawrence together, each driving a horse and buggy belonging to the plaintiffs, and each accompanied by a woman, and drove a few miles beyond Lowell, where the horse, called the bay colt, driven by Rowell, fell and died in a few minutes. There was evidence tending to show that the bay colt was killed by immoderate driving; and that the contract of hiring for both horses was made with Whipple, and that both horses were delivered upon the credit of Whipple; but this was denied by Whipple. It appeared that a few days before August 6th Whipple called at the plaintiffs' stable and engaged two teams for that day. The plaintiff Banfield testified that when Whipple engaged them, he in Whipple's presence entered them both upon his order slate in Whipple's name. The defendants testified that they saw the order slate at two different times prior to August 6th, and that one horse was entered to Whipple, and the bay colt to Rowell. Whipple also testified that the original entry of the charge for the bay colt was made to Rowell. It also appeared that the plaintiffs were acquainted with both defendants, and had let teams to each, prior to August 6th.

On the morning of August 6th Whipple called and took a horse and buggy, and soon after Rowell called and took the bay colt and buggy, delivered to him by Banfield, and soon afterwards the defendants met in Lawrence, and proceeded as above, Rowell having the full management and control of the bay colt

The defendant Whipple testified, among other things, in direct examination, that no claim had ever been made upon him for this dead horse. On cross-examination he testified that he had

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no suspicion that any claim was to be made upon him by the plaintiffs, prior to the suit. The plaintiffs were then allowed to prove that on the 7th of August he made an assignment of all his property, Rowell signing the same as attesting witness. The same evidence was also admitted, under the same circumstances, in relation to Rowell.

The defendants contended that they could not be held jointly, and asked the court to give the following rulings: "1. If Whipple hired the horse, and afterwards the plaintiffs knew it was to be used by Rowell, then, although Whipple might be liable for its use, he cannot be held for conversion or immoderate driving; 2. If the original charge on the order slate was made to the defendants separately, then Whipple cannot be held; 3. Under the evidence, there is no relation of master and servant or principal and agent; 4. If Whipple engaged the horse, and the plaintiffs understood it was to be used by another, for the pleasure or benefit of another, and not for the pleasure or benefit of Whipple, and then the plaintiffs delivered the horse to Rowell, understanding that he was the party who was to use it, Whipple cannot be held."

Upon the subjects embraced in these prayers the judge instructed the jury, substantially, that the defendant Whipple was not liable unless they were satisfied that the contract of hiring was made with him as to both horses, and that both horses were delivered upon his credit; but if they were so satisfied, and that Whipple intrusted the bay colt to Rowell to drive, who killed it by immoderate driving, he was liable under the second count; that the charges upon the order slate were evidence upon this issue, and if made as claimed by the defendants, strong evidence against the plaintiffs, but not necessarily conclusive; that if Rowell killed the horse by immoderate driving, he would be liable under the second count, whether it was hired by Whipple or himself. He also gave instructions as to what would constitute immoderate driving, and other instructions in the case which were not excepted to.

The jury returned a verdict for the plaintiffs, and upon inquiry by the court stated that they found a verdict against both

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defendants on the second count, and that the contract of hiring was made by Whipple, and the horse immoderately driven by Rowell so that he died. The defendants alleged exceptions.

*E. J. Sherman*, for the defendants. The defendants cannot be held jointly. They were not joint hirers. The act complained of was not their joint act. *Hewett v. Swift*, 3 Allen, 424. *Parsons* v. *Winchell*, 5 Cush. 592. *Campbell* v. *Phelps*, 1 Pick. 62. Whipple did not kill the horse himself, and Rowell was not his servant. Rowell had the full management and control of him, as the exceptions expressly find. *Sproul* v. *Hemmingway*, 14 Pick. 1. *Hilliard* v. *Richardson*, 3 Gray, 349. *Linton* v. *Smith*, 8 Gray, 147. The assignments were inadmissible in evidence. 1 Greenl. Ev. §§ 52, 448, 449.

*D. Saunders, Jr., & G. E. Hood*, for the plaintiffs.

Gray, J. The jury, by their verdict for the plaintiffs, have found that the horse was hired of the plaintiffs by Whipple, and was driven immoderately by Rowell with the aid and assistance of Whipple, and thereby killed. The general verdict against both defendants is not qualified, or turned into a special verdict, by the answers of the jury to the inquiries of the judge. The answer that the horse was immoderately driven by Rowell is conclusive of his liability, but does not necessarily show that Whipple might not also be liable under proper instructions and on sufficient evidence.

It is true that a master cannot be held liable jointly with his servant for an injury done by the servant in the master's absence to a horse hired by the master. *Parsons* v. *Winchell*, 5 Cush. 592. But that rule does not apply to the case of a horse hired by one person, intrusted by him to another, and injured by the immoderate driving of the second in the presence and with the assistance of the first. If Whipple hired this horse, and coöperated in the immoderate driving, either by speaking to Rowell or to the horse, or by exciting this horse by fast driving of the other, or in any other manner, the plaintiffs' previous knowledge that this horse was to be driven by Rowell for his own pleasure could not exempt Whipple from liability.

Evidence that the original charge on the plaintiffs' books was

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to Rowell by name was *prima facie* only, and not conclusive, that the contract of hiring was made with Rowell. *James* v. *Spaulding*, 4 Gray, 451. *Lee* v. *Wheeler*, 11 Gray, 239. *Commonwealth* v. *Jeffries*, 7 Allen, 564.

Whether the relation of master and servant, or principal and agent, existed between the defendants was a question of fact for the jury.

The specific instructions asked for were therefore rightly refused. The only instructions reported are those given "upon the subjects embraced in the prayers." The instruction that Whipple was liable if he hired both horses, and intrusted one to Rowell to drive, who killed it by immoderate driving, is to be taken as applied to the prayers for instructions, and to the admitted fact that the defendants were driving in company with each other when this horse was killed. No request was made for instructions upon the degree of presence and coöperation requisite to make Whipple liable as aiding and assisting in the immoderate driving by Rowell; and we must presume that this was covered by the instructions as to immoderate driving and other instructions, which, as the bill of exceptions states, were given and not excepted to.

The single exception taken to the admission of evidence relates to the assignments made by both defendants of all their property on the day after the accident. But these assignments made at that time, simultaneously, (Rowell being the attesting witness to Whipple's assignment,) without any proof of consideration except the recitals in the assignments, were some evidence that the defendants were conscious of liability and endeavored to escape from it, the weight of which was to be determined by the jury. *Stratton* v. *Farwell*, Middlesex, 1843.*

*Exceptions overruled.*

* The following note of that case was furnished by Mr. Justice Gray.

SIMON P. STRATTON *vs.* JACOB FARWELL.

ASSUMPSIT by the indorsee against the indorser of a negotiable promissory note made by Samuel Adams. The defence relied on was that the indorsement was forged. At the trial in the court of common pleas at December term 1842,

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## Elisha Quimby *vs.* Sally Cook.

An auditor appointed to state the account between the parties to a bill in equity to redeem land from a mortgage may properly hear evidence and report upon an agreement made by the mortgagor, after interest had accrued upon the debt secured by the mortgage, to treat the principal and accrued interest as a new principal, upon which interest should be thereafter computed; and such agreement, so far as it has been executed, is valid.

Bill in equity to redeem land from a mortgage. The case was referred to an auditor, to state the account between the parties, and he reported the following facts:

"That on the 21st of July 1830 the plaintiff gave to Samuel Cook, the defendant's testator, his promissory note for five hundred dollars, secured by a mortgage of real estate; that prior to the 21st of July 1855, there had been partial payments made by the plaintiff to said Cook, but never in excess of the interests due; that on the 21st of July 1855 the plaintiff and said Cook accounted together, and found that there was then due on said note, principal and interest together, the sum of nine hundred and fifty dollars; that then and thereupon it was agreed by and between them, in consideration of said Cook's forbearing to foreclose said mortgage or to put said note in suit, that said sum of $950 should thereafter stand as the principal of said note, and that the plaintiff should thenceforth annually pay interest on said sum; that in accordance with said agreement the plaintiff has annually paid the interest on said sum of $950, down to July 21st 1861, that date being a few months prior to the decease of said Cook; that the agreement as to interest since that time being executory, interest from that date can only be

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*Allen*, J., allowed the plaintiff, against the defendant's objection, to introduce evidence that the defendant, owning a large estate, on the same day on which Adams was arrested on his complaint for forging his name as indorser on this and like notes, and after the defendant had been sued on one such note, conveyed all his visible property, without valuable consideration, to his daughters and brother. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions, which at October term 1843 were

*Overruled by this court.*

*E. Buttrick*, for the defendant.

*E Mellen & E. R. Hoar*, for the plaintiff.

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reckoned upon the original principal of $500, and that, as the result of the foregoing, there is now due on said note from said plaintiff to said defendant, or her heirs, the sum of nine hundred and fifty dollars, together with interest on five hundred dollars from July 21st 1861 to the present time."

The account was stated accordingly. The plaintiff moved that the report be recommitted to the auditor; and the case was thereupon reserved for the determination of the whole court.

*D. Roberts*, for the plaintiff.

*G. Wheatland*, for the defendant.

Bigelow, C. J. The very elaborate and careful argument of Mr. Roberts has failed to convince us that the auditor exceeded his powers, or that there is any good reason for recommitting his report. An auditor is authorized to hear parties and their evidence in relation to every matter which is necessary or properly incidental to a correct statement of the accounts which are before him for investigation, and to decide questions of fact so far as they are involved in the matter submitted to him. This was determined in the well considered case of *Locke* v. *Bennett*, 7 Cush. 445, 451, and is in conformity to the long established practice in this commonwealth. Formerly the power of courts to appoint auditors was confined to cases which required an investigation of accounts or an examination of vouchers. Rev. Sts. *c.* 96, § 25. But by *St.* 1856, *c.* 202, reënacted in Gen. Sts. *c.* 121, § 46, the power is extended so as to embrace all causes at issue in every court, whatever may be the form of action, with authority to the auditor not only to hear the parties, examine their vouchers and evidence and state accounts, but also to "report upon any matters in the cause which may be included in the order of court;" thus empowering the court to confer on them a more extended authority than could have been granted to them under the law as it stood at the time of the decision of *Locke* v. *Bennett*. In the case at bar, the auditor did nothing more than to examine evidence and find facts which were necessary to enable him to make a correct statement of the account, and ascertain the amount which was due on the mortgage; nor does it appear that any more full or extended account was necessary to be



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stated than the one made by the auditor, in order to arrive at a correct understanding of the matters in dispute between the parties.

The agreement to pay interest on the accrued interest was not invalid, and the auditor was right in recognizing such agreement, and stating his account according to it, allowing interest upon interest, so far as it had been executed between the parties. *Eaton* v. *Bell*, 5 B. & Ald. 34. *Wilcox* v. *Howland*, 23 Pick. 167. *Motion to recommit auditor's report overruled.*

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## William H. Knowlton *vs.* Levi Sewall.

A., who owned a wharf, and B., who owned a stone quarry, signed and sealed an agreement together, providing as follows: B. agreed to carry all the stone quarried on his premises, that was to be carried away in vessels, to A.'s wharf, for nine years, and pay four cents per ton wharfage; and to continue to carry all the stone quarried there, that was to be carried away in vessels, after the expiration of nine years, and pay five cents per ton wharfage. A. agreed to receive said sums in full compensation for the wharfage, and to furnish and prepare a place to deposit ballast, and to keep his wharf and dock in good repair. The agreements on each side were fulfilled for nine years, after which B. sold his quarry. *Held*, that A. had no right of action to recover for B.'s failure to carry to A.'s wharf the stone quarried after the sale of the quarry, and that evidence was incompetent to shew that the usual price of wharfage for the nine years was five cents a ton.

Contract. The declaration alleged a failure on the part of the defendant to carry to the plaintiff's wharf a quantity of stone, according to the terms of the following agreement, signed and sealed by the parties:

"This identure, made this tenth day of December in the year of our Lord 1852, . . . witnesseth, that the said W. H. Knowlton, in consideration of the said Sewall's agreeing to carry all the stone quarried on his premises, that is to be carried away in vessels, on the said William H. Knowlton's wharf, for the space of nine years, commencing the 1st of February 1853, the said Knowlton agrees to receive as full compensation for wharfage four cents per ton for each and every ton of stone so carried away in vessels, the stone coming from said Sewall's quarry for the

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space of nine years, commencing February 1st 1853. And the said Sewall on his part agrees to carry all stone on the said Knowlton's wharf, that is quarried on his premises, for the space of nine years, commencing February 1st 1853, that is to be carried away in vessels, and pay four cents per ton for wharfage for each and every ton of stone so carried away in vessels. And the said Sewall further agrees to continue to carry all stone that is quarried on his quarry that he now occupies on the said Knowlton's wharf, that is to be carried away in vessels, after the expiration of the nine years aforesaid, and pay the sum of five cents per ton for wharfage for each and every ton of stone so carried away in vessels, after the expiration of the nine years. And the said Knowlton further agrees to receive all stone coming from said Sewall's quarry, and to receive five cents per ton as full compensation for wharfage for each and every ton of stone carried away in vessels after the expiration of the nine years aforesaid. And the said Knowlton agrees to furnish and prepare a place near Short Beach, so called, to deposit rough stone or ballast. And the said Knowlton agrees that the said Sewall shall have as good a privilege on his wharf and landing as he now has, in proportion to the business he does, and that said Knowlton will keep his wharf and dock in good repair, by having suitable time to do it after such repair is needed.

"To all of which stipulations, covenants and agreements, we, the parties aforesaid, do hereby mutually bind ourselves, our heirs, executors and administrators, firmly by these presents."

At the trial in the superior court, before *Ames*, J., it appeared that the agreement was executed on both sides for nine years, and on the 10th of May 1862 the defendant sold his quarry to other persons, after which the stone quarried there was not carried to the plaintiff's wharf. The plaintiff offered to show that during the nine years after the making of the agreement the usual rate of wharfage was five cents a ton; but the judge rejected the evidence, and ruled that upon the above facts the plaintiff could not recover. A verdict was accordingly taken for the defendant, and the case was reported for the determination of this court.

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*J. A. Gillis*, (*B. H. Smith* with him,) for the plaintiff.

*S. B. Ives, Jr.*, & *C. Sewall*, for the defendant.

DEWEY, J. The rulings of the superior court upon the legal effect of this somewhat anomalous contract seem to us to have been correct. We think that it must be understood, although very broad and unlimited in its language, to contemplate an arrangement only coextensive with the continued ownership, or at least possession, by the parties of their respective estates. It imposed no obligation on the plaintiff to continue perpetually to be the owner of his estate, nor upon the defendant to continue perpetually to be the owner of the estate upon which the stone quarry was situated. It was certainly a contract all the benefits of which to the plaintiff were wholly dependent upon the voluntary action of the defendant in carrying on the business of quarrying stone. If there were no stone quarried on the premises, then the plaintiff would have no profits from the contract; but no ground would exist for complaint for any breach of any obligation assumed by the defendant. The parties having made this contract with no provision as to the period of its limitation, the court must give it a reasonable construction. The rulings at the trial upon that point, and upon the effect of the evidence relied upon by the plaintiff to show that the defendant still continued to have the possession and control of the stone quarry, furnish no ground for setting aside the verdict.

*Judgment for the defendant.*

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BENJAMIN F. HALLETT & others *vs.* WILLIAM W. FOWLER.

A defendant in replevin who prevails in the action is entitled to judgment for a return, although he has gone into insolvency during the pendency of the action, if the assignee in insolvency does not appear to defend the same.

REPLEVIN of a piano. After the exceptions formerly taken by the plaintiffs had been overruled, (8 Allen, 93,) the defendant moved for judgment for a return, to which the plaintiffs objected. It appeared that after the commencement of the action, and

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before the rendition of the verdict, the defendant went into insolvency, and an assignee was appointed, who did not appear and take upon himself the defence. *Morton*, J., ruled that the defendant was entitled to judgment for a return; and the plaintiffs alleged exceptions.

*S. H. Phillips*, for the plaintiffs.

*S. Lincoln, Jr.*, (*S. B. Ives, Jr.*, with him,) for the defendant.

CHAPMAN, J. The plaintiffs having failed to maintain their action of replevin, the presiding judge ruled that the defendant was entitled to a judgment for a return of the property. The plaintiffs except to this ruling on the ground that, subsequent to the commencement of the suit, and prior to the rendering of the verdict, the defendant went into insolvency, and that his estate has been duly assigned in insolvency. Therefore the plaintiffs contend that as the property replevied has passed to the assignee, the defendant is not entitled to a judgment for a return. But the provision of the statute which authorizes an assignee to prosecute a suit (Gen. Sts. *c.* 118, § 47,) does not compel him to do so. He shall be admitted if he requests it, but he may exercise his own discretion on the subject. He can not be under any greater obligation to defend than he is to prosecute a suit which is pending against the debtor; and if he does not choose to interfere, the opposite party cannot undertake to assert his rights, or avail himself of them. In this case he has not interfered, but has left the defendant standing in the same relation to the plaintiffs as if there were no assignee. The defendant is therefore entitled to his judgment for a return, and, when the property comes into his hands by virtue of the judgment, the remedy of the assignee to recover the property, if he has a right to it, will be against the defendant and not against the plaintiffs. As he has not requested to be admitted as a party to this suit, it cannot be decided here whether he has any right to the property. *Exceptions overruled.*

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# MIDDLESEX COUNTY.

## COMMONWEALTH *vs.* HERMAN HAUPT.

The Commonwealth undertook to aid a railroad corporation by the issue of scrip upon certain terms and conditions, for the sum of $2,000,000, payable in thirty years from date, "which may be expressed in the currency of Great Britain and payable to the bearer in London, or issued in federal currency, payable in Boston, as the directors of the corporation might elect when they should apply for each issue of the scrip." The corporation agreed with contractors that the whole of the state scrip that might be issued should be exclusively appropriated to work done or to be done, in compliance with the terms and conditions of the legislative act authorizing the loan of state credit, and that the same should be promptly handed to the contractors. The corporation accordingly from time to time gave orders for the delivery of the scrip to the contractors, who elected to receive it in the currency of Great Britain, and in ascertaining the amounts each pound sterling was reckoned at $4.44, and the scrip was issued on that basis, upon orders of the governor and council and certificates of the state engineer, which were expressed in dollars. During all this time the equivalent in this market for a pound sterling was about $4.91. The contractors sold the scrip for less than its par value. *Held*, that the Commonwealth might maintain an action for money had and received against the contractors, to recover back the excess received by them upon the sale of the scrip, over the amount at which it was reckoned when it was issued.

If a contract is made to give obligations for a certain sum of money, which at the election of the party who is to receive it may be expressed in the currency of Great Britain, and no standard is agreed upon by the parties at which the pound sterling shall be reckoned, it should be reckoned at $4.84.

CONTRACT for money had and received by the defendant to the plaintiffs' use. The case was submitted to the court upon the following facts:

The Commonwealth of Massachusetts agreed to lend its credit to the Troy and Greenfield Railroad Corporation, to an amount, for the purposes, and upon the conditions, specified in *St.* 1854, *c.* 226, and the subsequent acts in amendment thereof which may be referred to. Under the provisions of these acts the state scrip to be delivered from time to time to said corporation, as it should become due, was to be expressed either in federal currency, payable in Boston, or in the currency of Great Britain, payable in London, as the corporation should elect. On the 18th day of February 1858, the corporation made a contract with the defendant and his associates for the construction of said railroad, and agreed to deliver to them, as part of

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their compensation, any state scrip that might at any time be delivered to the treasurer of the company. In pursuance of the terms of this contract, and upon the filing of the certificates required by the acts aforesaid of the amounts of scrip due from the Commonwealth to the corporation, which certificates were expressed in dollars and cents, and upon the filing of written orders from the treasurer of the corporation, scrip was delivered by the Commonwealth to the defendant or his order, expressed in the sterling currency of Great Britain, the defendant having elected and requested to receive the same in sterling instead of federal currency, at various times from the 6th of October 1855 to the 7th of March 1861, to the amount in all of £114,500, and each pound sterling was reckoned at four dollars and forty-four cents. This scrip was issued upon orders of the governor and council, and certificates of the state engineer, which were expressed in dollars and cents, and were of the amount of $508,507; and upon orders of the treasurer of the corporation was delivered to the defendant. During the whole period within which the several deliveries of sterling scrip were made to the defendant as aforesaid, the equivalent in this market for a pound sterling was more than four dollars and forty-four cents, and about four dollars and ninety-one cents in gold coin of the currency of the United States; and if the exact equivalent is material, it may be ascertained by an assessor.

The Commonwealth contended that each pound sterling ought to have been computed at its equivalent in this market, and that there has been an over payment, which may be recovered back in this suit. The defendant contended that there has been no over payment, and that the claim of the Commonwealth, if any, is against the Troy and Greenfield Railroad Company.

The defendant allowed to the Troy and Greenfield Railroad Company the same sum the bonds were taken for by the company of the Commonwealth. A mortgage was executed by the railroad company to the Commonwealth, according to the provisions of the act referred to.

It was also claimed to be a fact by the defendant that he sold

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the sterling bonds delivered to him, after using due diligence to obtain the highest price, at less than their par value; and it was agreed that this fact should be found by an assessor if material; and that, if the action can be maintained, the case should be submitted to an assessor to find the amount for which judgment should be rendered.

*D. Foster*, for the Commonwealth. It was a plain mistake to compute the pound sterling at $4.44. This was originally its custom-house value. *St.* of U. S. of 1799, *c.* 22, § 61. By *St.* of U. S. of 1842, *c.* 66, § 1, this was changed to $4.84. There is no statute fixing the value of pounds sterling. The above statutes only fix the rate for the payment of duties. Formerly English coins were a legal tender by weight, but ceased to be so by *St.* of U. S. of 1857, *c.* 56, § 3. At present there is no foundation for the assumption that the true value of the pound sterling is $4.44. See *Schermerhorn* v. *Talman*, 14 N. Y. 93. There was, therefore, an over payment. The statute fixed the sum in dollars; and the officer, in computing the sum at which it should be expressed in pounds, made a mistake. This was a mistake of fact. The defendant might have been enjoined in equity from negotiating the excess. Having negotiated it, he is liable to refund the amount received. *Cox* v. *Prentice*, 3 M. & S. 349. *Baltimore &c. Railroad* v. *Faunce*, 6 Gill, Md. 68. *Johnson* v. *Rutherford*, 10 Penn. State R. 455. *Boyer* v. *Pack*, 2 Denio, 107 The action is properly brought against the defendant, instead of the company. *Jefts* v. *York*, 10 Cush. 392. *Appleton Bank* v *McGilvray*, 4 Gray, 518. An action for money had and received is the proper remedy.

*J. G. Abbott & G. B. Perry*, for the defendant. There is nc privity between the Commonwealth and the defendant. The statutes provide for a delivery of the scrip to the railroad company; and the railroad company were to secure the Commonwealth therefor by a bond and mortgage, which they accordingly did. The corporation became entitled to receive the scrip. There was no contract between the Commonwealth and the defendant. No payment was made to him. He in no way contributed to the mistake, if there was one. He merely received the scrip in

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payment of a debt due to him from the corporation, and disposed of it before any notice was given of a mistake. If there is any liability to refund, it is on the part of the corporation.

But there is no such liability. There was no mistake. It may be conceded that there is no law fixing the rate of reckoning the pound sterling. Its value changed from day to day. It was necessary for some one to fix the value. It was made the duty of the treasurer of the Commonwealth to do it. There was no law to guide him. He knew all the facts. There was no concealment or misapprehension. If there was an error, it was an error of judgment, for which nobody is liable. But there was no error. The treasurer followed the rule adopted under like circumstances in the case of the Western Railroad Company, and the provisions of the federal law. Besides, by *St.* 1860, *c.* 202, the deliveries which had then been made were recognized as proper, and thus sanctioned and ratified.

The Commonwealth have advanced nothing but promises, and the railroad company assume to pay these promises, and indemnify the Commonwealth. It does not appear that the Commonwealth will even be called on to pay the scrip. An action cannot be maintained to recover back money paid by mistake, where no money has been paid, and perhaps never will be. *Nightingal* v. *Devisme*, 5 Burr. 2589. At least a demand should have been made before bringing the action.

Hoar, J. This suit is an interesting and important one from the nature of the questions which arise in it, and from the large amount of property involved; but its decision depends upon the just application of familiar principles. It is brought to recover the value of a certain scrip issued by the Commonwealth in aid of the construction of the Troy and Greenfield Railroad; which it is now claimed was delivered to the defendant by mistake, and has been converted into money by him. By the provisions of *St.* 1854, *c.* 226, confirmed and modified by *Sts.* 1859, *c.* 117, and 1860, *c.* 202, the treasurer of the Commonwealth was "authorized and instructed to issue scrip in the name and behalf of the Commonwealth, for the sum of two millions of dollars, which may be expressed in the currency of Great Britain, and

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may be payable to the bearer thereof in London," "or the said scrip may be issued in federal currency, payable in Boston, as the directors of the Troy and Greenfield Railroad Company shall elect, when they apply for each and every issue of said scrip;" and to deliver the same to the treasurer of the company from time to time, in sums proportioned to the progress of the work of constructing the railroad and tunnel, ascertained and certified under the conditions prescribed in the several statutes. By the contract which the railroad company made with the defendant for the construction of the road and tunnel, he was to receive all the scrip which should be issued by the Commonwealth, and orders were drawn for its delivery to him from time to time as it became due. The amount for which the scrip was to be issued was ascertained and fixed in federal currency; and the election was made to receive it in each case in scrip to be "expressed in the currency of Great Britain, and payable in London." In changing the sum from federal currency to the currency of Great Britain, the treasurer of the Commonwealth reckoned the pound sterling as equivalent in value to four dollars and forty-four cents of federal currency, and delivered to the defendant from time to time amounts of scrip ascertained upon that basis of computation. The defendant allowed to the railroad company the several sums for which the scrip was taken of the Commonwealth; and converted the bonds into cash for the best price he could obtain in the market, which he avers was less than their par value.

The first question is, was there a delivery of property to the defendant by mistake, to which he was not entitled, and which he received without consideration? Upon this question we can have no doubt. The duty of the treasurer, acting on behalf of the Commonwealth, was simply ministerial, and precisely defined by law. He was to compute the equivalent of a certain number of dollars in pounds sterling, and to issue scrip for the number of pounds thus ascertained. If by a mistake in computation he issued scrip for more than such an equivalent, he exceeded his authority. He had no right to deliver the excess, and the defendant had no right to receive it. The basis of computation was equally open and known to both. If it was

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erroneous, and the defendant knew it, it was a fraudulent act on his part to accept the excessive amount. If he did not perceive the error, it was a case of mutual mistake.

But the defendant denies that there was any error; and now contends that there is no legal standard by which the relative value of a pound sterling and a dollar is fixed in this commonwealth; that it was a matter of estimate, to be determined by the treasurer, or by agreement of both parties; and having once been settled in good faith, is not afterward to be disturbed.

It is a sufficient answer to this proposition, that whatever may be the just standard of comparison between the two currencies, and however it is to be ascertained, it is apparent that one was adopted which was wholly inadequate and erroneous. The parties agree that during the whole period within which the deliveries of sterling scrip were made to the defendant, the equivalent for the pound sterling in this market was more than four dollars and forty-four cents. The value affixed to the gold sovereign of England, which is the coin representing the pound sterling, by the law of the United States, in payments to or by the treasury, and in appraising merchandise at the custom-house, was then and still is four dollars and eighty-four cents. *St.* of U. S. of 1842, *c.* 66. 5 U. S. Sts. at Large, 496. Before the year 1857 gold sovereigns were a legal tender by weight, at a rate fixed by law in proportion to their fineness, as determined by an annual assay at the mint. By the *St.* of U. S. of 1857, *c.* 56, all acts authorizing the currency of foreign gold and silver coins, and making them a legal tender in payment of debts, were repealed; but the director of the mint was required to cause assays of them to be made from time to time, to determine their average weight, fineness and value, and to embrace in his annual report a statement of the results thereof. 11 U. S. Sts. at Large, 163. The annual report of the director, in obedience to this law, has shown the average value of the English gold sovereign, as compared with our own gold coin, to be $4.84.48; and the average value at which they are taken at the mint for recoinage, to be $4.82.06. The current price of sovereigns in the money market, usually somewhat higher, is affected

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by the temporary demand for them and by the rates of exchange. It is manifest, therefore, that the treasurer did not correctly express in the currency of Great Britain the number of dollars in scrip which he was authorized to deliver, and which the defendant asked him to deliver. By a misapprehension of his duty, he made the sum grossly excessive. He adopted as the basis of calculation a sum which had no legal or commercial relation to the computation to be made. He took what is called among merchants and bankers "the par of exchange," a current phrase which has no other meaning than the value of the pound sterling formerly fixed by law for purposes of revenue. But the statute under which he was acting no more contemplated such an arbitrary and conventional standard, than it did the mere numeral transfer from one currency to the other, dollar for pound.

We do not see that the mistake under which these parties acted was substantially different in its nature or legal consequences from that which occurs when there is an agreement to deliver a certain quantity of an article, and a wrong measure is used; as if, for example, a measuring tape were taken, one side of which was divided into the surveyor's measurement of chain and links, and the other into feet; and the links were to be applied in ascertaining the quantity, supposing them to be feet. Or perhaps a nearer analogy would arise if the treasurer had mistaken the pound sterling for the pound which was once a unit of value in this commonwealth, of twenty shillings, of which six were equivalent to the federal dollar.

We do not think the rate of exchange was to be considered, because, although the scrip was payable in London, it was not to be paid for thirty years; and there could be no means of determining what difference in value the difference in exchange would produce at the end of that time. The election given to the company to take the same sum either in federal currency or in that of Great Britain may, besides, give some countenance to the presumption that the legislature intended to give them the advantage, if any there were, which the fluctuations in exchange might occasion.

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That money paid or property delivered, under a mutual mistake, may be recovered back in a proper form of action, between proper parties, is a principle of law so elementary and well settled that it hardly needs the citation of authorities. *Appleton Bank* v. *McGilvray*, 4 Gray, 578. *Cox* v. *Prentice*, 3 M. & S. 344. In *Bayer* v. *Pack*, 2 Denio, 107, the mistake was made by a person employed to cast the interest on a bond, who made annual rests, and thus computed interest upon interest; and both parties took his computation as accurate; but it was held that the over payment might be recovered back.

The next ground taken in defence is that the Commonwealth have suffered nothing by the mistake, because they have merely issued promises to pay, and it is not to be presumed that they will ever be called on to pay anything, because they have the indemnity of the railroad company. But we cannot see how the railroad company can be held liable to pay for scrip which was issued to their contractor by mistake; which they had not authorized him to receive; which was not due to them under the contract with the Commonwealth; and which has not gone to their use. The excess has gone to the defendant's use, without diminishing the amount which the Commonwealth is under obligations to advance, as the work goes on hereafter.

Where money has been paid by mistake it may be recovered back in an action for money had and received to the plaintiff's use. And although the person who receives it may be only an agent, the action may be maintained against him if he has not paid it over to his principal or otherwise altered his situation respecting it before he has notice of the error. If a man sent his servant to a bank with a check for a hundred dollars in payment of his wages, and the cashier, by mistake, should pay out eleven ten dollar bills, the bank could certainly recover back the ten dollars overpaid, in an action against the servant.

But the objection is made that this form of action, for money had and received, will not lie for anything but money, and that the bonds which were issued were not money, but only evidences of debt. The obvious answer is, that the defendant acquired no property in the bonds which were delivered to him in excess of

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the amount to which he was entitled. It would have been his duty to return them, if they had been demanded of him before he disposed of them. The essence of the transaction is, that he has received by mistake obligations of the state which he has converted into money. They were not his; and the money he has received for them was money received to the use of the party whose property he sold, having received it without consideration under a mistake of computation. If the defendant is right in supposing that, if he had not sold them, the action would have been in the nature of trover, and a demand necessary before bringing the action; yet, having sold them, the owner may waive the tort, ratify the sale, and maintain an action for money had and received for the proceeds. *Lamine* v. *Dorrell*, 2 Ld. Raym. 1216.

The case will therefore be sent to an assessor, according to the agreement of the parties, to determine how much scrip was delivered to the defendant by mistake. To ascertain this it will be necessary to decide at what rate the pound sterling should have been computed as an equivalent to federal currency. In *Adams* v. *Cordis*, 8 Pick. 260, where a trustee was charged in a suit here for a debt to be paid in England, "the par of exchange," that is, the rate at which the pound sterling was reckoned at the custom-house under the existing law of the United States, was taken by the court as the standard for estimating in federal currency the debt which was due in pounds sterling. And nothing was allowed in addition for exchange in computing the damages. And in the recent case of *Otis* v. *Coffin*, 7 Gray, 511, decided in 1856, where it appeared that money invested in this country was ordered by a testator to accumulate until it amounted to £20,000, the court decided that it should be computed at $4.44 to the pound, and was therefore to be fixed at $88,888.88, [$88,800.00,] and no more. The will was made in 1839, and the testator died the same year, before the statute fixing the custom-house value of the pound sterling at $4.84 was passed. The counsel for one of the parties claimed that "the established par of exchange, $4.44,' should be taken as the measure of the pound sterling, and nothing appears to have been

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said to the contrary by the other counsel in the cause, nor was the change in the value for revenue purposes made by the statute of 1842 alluded to by the counsel or the court. Applying the doctrine of these cases, we think it must be regarded as the rule judicially adopted, to take as the value of the pound sterling where no standard has been agreed on, the value at which it is provided by law that it shall be taken and paid at the national treasury. The assessor will therefore fix the pound sterling at $4.84.

The value of the pound sterling, in calculating the rates of duties, was fixed at four dollars and eighty cents by *St.* 1832, *c.* 227, § 16. The *St.* of 1842, *c.* 66, § 1, fixing it at $4.84 for all purposes of revenue and of payments to and from the treasury, followed somewhat tardily the change in the value of our national gold coinage, which took effect July 31st 1834; and appears to have been occasioned by it. The true par of exchange between two countries is the equivalent of a certain amount of the currency of the one in the currency of the other, supposing the currency of both to be of the precise weight and purity fixed by their respective mints. McCulloch's Com. Dict. tit. Par of Exchange. Or in another form, it is the amount which the standard coin of either country would produce when coined at the mint of the other. Measured by this rule, the value of the pound sterling varies very little from the value given it by the United States for purposes of revenue and treasury payments; and the value of $4.84 may therefore be adopted as the rule in courts of justice with results substantially equitable.

The excess of scrip issued being ascertained upon this basis of computation, the Commonwealth will be entitled to recover the sum for which it was sold by the defendant, with interest from the date of the writ. In an action for money had and received, the commencement of the suit is a sufficient demand.

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## Michael Barrett *vs.* City of Cambridge.

**No action lies to recover back a tax paid before process had been issued for its collection, although the tax was illegal.**

Contract brought to recover back the amount paid by the plaintiff for a tax illegally assessed upon him by the defendants

It was agreed in the superior court that, on the 6th of May 1857, the plaintiff and others petitioned the city government of Cambridge to grade Charles Street and a part of Fourth Street, and assess the expenses upon the abutters according to law. The streets were accordingly graded and an amount assessed upon the plaintiff, payment of which was demanded of him, and, in August 1858, he paid the same to avoid proceedings against his property, although no process had issued at the time. The plaintiff duly demanded repayment of the amount.

Upon these facts, judgment was rendered for the defendants, and the plaintiff appealed to this court.

*C. S. Lincoln*, for the plaintiff.

*T. H. Sweetser*, for the defendants.

Metcalf, J. The city government of Cambridge had no authority to assess the plaintiff, or any other person, for the expense of grading Charles Street and part of Fourth Street; the *St.* of 1853, *c.* 315, having been adjudged to be unconstitutional and void. *Morse* v. *Stocker*, 1 Allen, 150. And as no process was issued for the collection of the assessment, the plaintiff must be held to have paid it voluntarily when it was demanded of him, and therefore cannot recover it back. He was under no compulsion, which the law recognizes as a ground for such recovery. See *Boston & Sandwich Glass Co.* v. *Boston*, 4 Met 181; *Forbes* v. *Appleton*, 5 Cush. 117, 118; *Lee* v. *Templeton* 13 Gray, 476. *Judgment for the defendants.*

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JAMES O. LYNDE & another *vs.* INHABITANTS OF MELROSE.

If a tax title proves invalid, the purchaser at the collector's sale cannot maintain an action against the town to recover back the money paid by him as the consideration of the purchase, and the expenses of defending his title.

HOAR, J. This action is certainly of novel impression. One of the plaintiffs purchased a tax title at a sale by the collector of taxes in the defendant town, and sold it to the other. The owner of the land having brought a writ of entry against them and recovered possession of the land, on the ground that the tax was illegally assessed, they now join in a suit against the town to recover the amount paid to the collector, and all the costs and expenses of the real action.

No precedent for maintaining such a suit is found; and the plaintiffs' counsel rests his argument solely upon the ground that the defendants have received the amount of the tax without consideration. If this be true, it is not easy to see how the plaintiffs get a joint right of action; nor how the defendants could be responsible for more than the sum of $1.39, the amount of the tax which would go to the town treasury. But there is a plain distinction between the right of a person to recover from the town the amount of a tax unlawfully assessed upon him, and the claim of the purchaser, under a collector's deed, whose title proves defective. The town is not a party to the deed. The purchaser is a mere volunteer in the payment of the tax. He has the same means of knowing whether it is legally assessed that the town has. He buys a title without warranty, except such covenants as he takes from the collector; and he must rely only upon them. Beyond those covenants, his deed is in the nature of a mere quitclaim, for which he has paid what he thought the chance was worth. His speculation may prove very profitable, or wholly unproductive; but no one has taken his property without his consent, or with any contract, express or implied, to reimburse him if his bargain proves a losing one. Where there is no fraud or imposition, the sale of land without



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warranty creates no obligation to return the purchase money in any event.

*Judgment for the defendants on the demurrer affirmed.*

*N. B. Bryant*, for the defendants, was not called upon.

*A. V. Lynde*, for the plaintiffs.

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CITY OF CAMBRIDGE *vs.* CAMBRIDGE RAILROAD COMPANY & others.

MAYOR AND ALDERMEN OF THE CITY OF CAMBRIDGE *vs.* SAME.

A provision in the charter of a street railway company that, at any time after the expiration of ten years from the opening of any part of the road for use, a city may purchase of the corporation so much of the corporate property as lies within its own limits, at a specified price, does not give to the city any such interest or right as to enable it to maintain a bill in equity to restrain the corporation from raising passenger fares upon their road, in violation of conditions expressly assented to by the corporation, and imposed upon them by the mayor and aldermen of the city when granting to them the power to locate and build a new line of their railway through additional streets, if they are guilty of no fraudulent intent to destroy or depreciate the value of the corporate property although the value of their franchise and property will be thereby diminished, and the portion of their railway constructed under such authority will perhaps be exposed to forfeiture. Nor can the mayor and aldermen of the city maintain such bill.

TWO BILLS IN EQUITY. The first alleged that by *St.* 1853, *c* 383, the Cambridge Railroad Company were incorporated, "with power to construct, maintain and use a railway or railways with convenient single or double tracks, from such point or points of the city of Cambridge, upon and over the streets or highways therein, as shall be from time to time fixed and determined by vote of the mayor and aldermen of the said city of Cambridge, and assented to in writing by the said corporation and over the roads, estates and bridges belonging to the Hancock Free Bridge Corporation to the intersection of the streets of Boston, as shall be from time to time fixed and determined by vote of the directors of the Hancock Free Bridge Corporation and assented to in writing by said corporation;" "provided however, that all tracks of said railroad shall be laid at such

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distances from the sidewalks in said cities as the mayor and aldermen thereof, respectively, shall in their orders fixing the routes of said railroad determine to be for the public safety and convenience;" "and said corporation to have the power to fix, from time to time, such rates of compensation for transporting persons and property as they may think expedient;" that in and by said statute the corporation was to continue for fifty years; that it was further therein provided that "the cities of Boston and Cambridge may, at any time during the continuance of the charter of said corporation, and after the expiration of ten years from the opening of any part of said road for use, purchase of said corporation all the franchise, property, rights and furniture of said corporation by paying them therefor such a sum as will reimburse to each person who may then be a stockholder therein the par value of his stock, together with a net profit of ten per cent. per annum, from the time of the transfer of said stock to him on the books of the corporation, deducting the dividends received by said stockholders thereon;" that by *St.* 1854, *c.* 205, it was provided that "either of the cities of Boston and Cambridge, if it so elect may purchase, on the same terms and conditions" above mentioned "that part of the corporate property of this company which relates or lies within its own limits, paying therefor a proportional sum, to be ascertained by commissioners to be appointed by the supreme judicial court;" and that "this act shall be void and of no effect, unless the same shall be accepted by the city council of the cities of Boston and Cambridge respectively, within one year;" that each of said acts was duly accepted by the city council of Boston and Cambridge respectively, and by said corporation; that a route was thereafter only fixed upon over certain streets in Cambridge, and accepted by the corporation, and a railway constructed, opened and used over the same; that the city have the right, after the expiration of ten years from the opening of any part of said railway for use, to make the purchase hereinbefore provided for; that said ten years have not yet elapsed; that by the aforesaid statutes and the acts of the parties under the same, a contract has been created on the part of the corporation to sell to the city, according

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to the provisions of the statutes, and the city has a vested right to purchase, the franchise and corporate property within the city of Cambridge, after the lapse of said ten years; that therefore the corporation are bound not to destroy or injure the same, or commit acts in the nature of waste thereof, or allow the same or any part thereof to be forfeited or destroyed; that in 1863 the corporation applied to the mayor and aldermen of Cambridge for leave to lay a track through additional streets of that city, praying that the location thereof might be accompanied with provisions that they should run a certain number of trips each day, and at fares not above a certain stipulated price; that the mayor and aldermen had power to fix and determine upon what agreements, provisions, terms or conditions the tracks of the railway should be laid over any streets of Cambridge, and that the same, when so fixed and determined, and when assented to by the corporation, became binding upon the corporation; that the mayor and aldermen accordingly accepted the proposal of the corporation, and fixed and determined that the corporation might construct, maintain and use a new track over certain additional streets, as prayed for, upon the terms and conditions proposed by the corporation, and the corporation assented thereto, and have accordingly laid, opened and used a new track over the same; that this new portion of said railroad is valuable and important to the city in case they shall elect to make the purchase provided for by the statutes; that to take up the same would be greatly injurious to the railroad as a whole; that the terms and conditions imposed by the mayor and aldermen are lawful and reasonable, and ought to be observed and kept; that the violation of them by the corporation will cause a forfeiture of the new portion of the railway; that the corporation have now raised the fares for passengers above the price stipulated for in the terms and conditions fixed by the mayor and aldermen and agreed to by the corporation, and intend and threaten to keep them at such increased rate; that these acts and doings are in violation of said conditions, and will, if persisted in, cause a forfeiture of the new portion of the railway, as aforesaid, and thus prevent the city from ever acquiring by purchase the right therein to which

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it is entitled. The prayer was for an injunction to prevent the corporation from raising the fares or keeping them above the price stipulated as aforesaid, and for further relief.

The second bill was brought by the mayor and aldermen of the city of Cambridge, and set forth substantially the same facts as the first bill, and sought for the same relief.

The defendants filed a general demurrer, and the cases were reserved by *Gray*, J. for the determination of the whole court.

*H. W. Paine & G. G. Hubbard*, for the defendants. The two bills ask the same relief. The bill brought by the city is on the ground that the corporation are proceeding improvidently, and exposing the franchise and property to forfeiture. The other is on the ground of a contract. 1. A non-compliance with the conditions is no cause of forfeiture. The mayor and aldermen had no power to impose such conditions. The statutes give no such power. The mayor and aldermen were not representatives of the city. The powers intrusted to them might as well have been vested in somebody else. Nor do the conditions derive any additional validity from the assent of the corporation. The corporation, by their charter, must fix the rates of fare, and cannot divest themselves of this duty. *Clay* v. *Rufford*, 5 De G. & Sm. 768. *Presbyterian Church* v. *New York*, 5 Cow. 538. *Coates* v. *New York*, 7 Cow. 585. *Goszler* v. *Georgetown*, 6 Wheat. 593. The rate of fares should vary. What is a reasonable price now will be too high when we return to a specie basis. 2. The city has no such interest as to entitle it to ask the relief sought for. It has no interest in the railway. It must first elect to purchase. There is no averment of fraud on the part of the corporation. If the right to an injunction exists in this case, it would also exist to restrain any improvident management. It would amount to this, that the corporation must operate their road under the direction of this court. Even assuming it to be a contract, the case is not altered. The probability of a future title is not sufficient. 3. This was certainly not a contract with the mayor and aldermen. They are not competent to be a party to such an agreement. They have no more interest than any citizen. 4. There was no consideration for such a contract. If the

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public interests required the location of new tracks, it was the duty of the mayor and aldermen to grant such location without any consideration. *Commonwealth* v. *Cambridge*, 7 Mass. 158. *Commonwealth* v. *Sawin*, 2 Pick. 547. *Dudley* v. *Cilley*, 5 N. H. 558.

*C. T. Russell*, (*J. A. Jacobs* with him,) for the plaintiffs. 1. By the various acts referred to, a contract was created between the corporation and the city, which the city may enforce. *Charles River Bridge* v. *Warren Bridge*, 7 Pick. 344. The corporation also took their charter under a specific trust, in favor of the city. The city has the vested right to make the purchase provided for. This is equivalent to a grant to the city of a valuable franchise. Such grant is constitutional and proper. *West River Bridge* v. *Dix*, 6 How. 507. *Boston Water Power Co.* v. *Boston & Worcester Railroad*, 23 Pick. 360. This franchise or right of the city is entitled to the protection of the court. There is no distinction, in this respect, between a franchise in actual exercise and one which a party is entitled to come into the exercise of. Most suits to stay waste are brought by parties having absolute or contingent rights to the future possession. This right of the city is valuable. It may be protected by a court of equity. The fact that it is uncertain whether the city will ever make the purchase is no reason for refusing relief. *Robinson* v. *Litton*, 3 Atk. 209. *Garth* v. *Cotton*, 1 Dickens, 183, 204. *Taylor* v. *Robinson*, 7 Allen, 253.

2. The conditions fixed by the mayor and aldermen were valid. The statutes vested in them the power to make such conditions. And it is entirely within the corporate powers of the company to accept such conditional license to occupy the streets. *Ludlow* v. *New York, &c. Railroad*, 12 Barb. 440. *Underhill* v. *Saratoga, &c. Railroad*, 20 Barb. 455. *Rathbone* v. *Tioga Navigation Co.* 2 Watts & S. 74. The mayor and aldermen acted as agents of the city, intrusted with the care of public streets. *Roxbury* v. *Boston & Providence Railroad*, 6 Cush. 430, 431. Such permission or grant by the mayor and aldermen is an irrevocable license, or contract with the corporation. *Attorney General* v. *Mayor, &c. of New York*, 3 Duer R. 119. *Davi.*

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v. *Mayor, &c. of New York*, 4 Kernan, 506. Their authority in Massachusetts is derived from statute, and may be exercised absolutely or conditionally. See *Day* v. *Green*, 4 Cush. 433. *Boston* v. *Schaffer*, 9 Pick. 415. *Drake* v. *Hudson River Railroad*, 7 Barb. 508. *Milhau* v. *Sharp*, 15 Barb. 210, 218, 232; *S. C.* 17 Barb. 435. *Williams* v. *New York Central Railroad*, 18 Barb. 222. Besides, this power has been recognized by the legislature. *St.* 1864, *c.* 229, §§ 26, 45.

3. These conditions have been violated; and the consequence is the same as if the license had been revoked. The railway becomes an unlegalized obstruction in the streets; the company have no right to maintain it; it becomes a nuisance in law. *Springfield* v. *Connecticut River Railroad*, 4 Cush. 63. *Day* v. *Green*, Ib. 433. *Roxbury* v. *Boston & Providence Railroad*, 6 Cush. 424, 428. *Commonwealth* v. *King*, 13 Met. 115. *Commonwealth* v. *Nashua & Lowell Railroad*, 2 Gray, 54. *Commonwealth* v. *New Bedford Bridge*, Ib. 339, 345. *Commonwealth* v. *Vermont & Mass. Railroad*, 4 Gray, 22.

4. This is an injury to the city. They have the right to purchase the railway on certain terms. This right is injured by the acts complained of. The franchise of the city to take the railway is as much entitled to protection as the franchise of a railroad corporation to have other railroads excluded from certain limits. *Boston & Lowell Railroad* v. *Salem & Lowell Railroad*, 2 Gray, 1. *Boston Water Power Co.* v. *Boston & Worcester Railroad*, 16 Pick. 521, *et seq.*

Bigelow, C. J. We think it very clear that neither of these bills can be maintained:

1. First as to that instituted by the city of Cambridge. By the terms of the acts incorporating the defendants, *St.* 1853, *c.* 383, and *St.* 1854, *c.* 205, it is manifest that the care and management of all the business and prudential affairs appertaining to the roads belonging to the defendants are intrusted by the legislature exclusively to the corporation. After the location of the road is completed, according to the provisions of these statutes, it is the province and duty of the corporation to construct and maintain the road, to continue the use of so much of

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it as they may deem expedient, prescribe the rate of fares, and direct the mode of using the road by the public, subject only to such regulations as the mayor and aldermen of the cities in which the road is located may make concerning the rate of speed and the manner of using the tracks. This delegation of power to the corporation over the management of the road is full and complete, without restriction or limitation, and it cannot be interfered with so long as it is exercised in good faith. The city of Cambridge has no right or interest in the road or its management, other than or different from that which belongs to any other municipal corporation in the Commonwealth, except that which may exist or accrue by reason of the provisions contained in § 7 of the original charter of the corporation, *St.* 1853, *c.* 383, by which the right is granted to the cities of Boston and Cambridge of purchasing the franchise and property of the corporation on certain prescribed terms at any time during the continuance of the charter, and after the expiration of ten years from the opening of any part of the road for use. But this right of preëmption, even if it be conceded to be in the nature of a contract, confers no right or power on the city to interfere with or control the administration of the affairs of the corporation by its directors or other officers, so long as they are conducted in good faith, and no fraud or unfair dealing in the management of the road or its business is alleged. More especially is this so during the period which must elapse before the time shall have expired when the right of purchase will accrue to the city, and while they can set forth only a probability of acquiring a future title to the road and franchise, contingent on the election of the city to exercise the right of purchase, an event which may never happen. The allegations in the bill go no further than to aver indiscreet and improvident management by the corporation, by which a portion of the road, as already located, will be discontinued, and the right to maintain it forfeited and lost, whereby great pecuniary loss may be occasioned to the corporation, and the contingent right of purchase by the city may be injuriously affected and its value impaired. But these allegations amount to nothing more than an averment that the affairs of the

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corporation are not wisely and discreetly conducted. The same result would follow if the corporation should purchase horses and grain at prices which the plaintiffs should allege to be exorbitant or excessive, or should manage any other branch of their business in a manner which might be deemed to be imprudent or careless. Such matters are by law intrusted to the corporation, and their doings cannot be revised or regulated, or in any way interfered with, so long as they act fairly and without fraud Putting aside all other objections to the maintenance of the bill, we are therefore of opinion that the city show no such right or interest as to authorize them to call in the aid of a court of equity to restrain the defendants from the exercise of the powers conferred on them by law.

2. It is equally clear that the allegations in the bill brought by the mayor and aldermen of Cambridge show no right in them to equitable relief. We are unable to see any plausible ground on which they can be held to be proper parties to any suit against the defendants, either for an infringement of the provisions of their charter or of a want of fidelity and due care in the management of the business and affairs of the corporation, or for a breach of any alleged contract or agreement into which they have entered. Certainly no right or authority to exercise any supervision or control over the defendants, or to require them to conduct the operations of their road in any manner other than is deemed expedient or proper by the defendants, or to enforce any supposed agreement or condition, is vested in the mayor and aldermen, under the general powers and duties devolved on them by law, as officers acting for the city. Nor is there any such right or authority vested in them by the acts incorporating the defendants. So far as they are intrusted with any power in relation to the location and construction of the road, and other matters connected with its use, these duties are specifically enumerated and defined, and they are to be performed by them, not as officers acting for or representing the city, but as a body of men on whom certain duties of a ministerial or *quasi* judicial nature are by law devolved. These duties have no necessary or essential connection with those which they are

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called on to perform in their official capacity, as a branch of the city government. They might have been imposed as well on any other body of men, if the legislature had seen fit, although it was doubtless wise as a matter of convenience and expediency that they should be performed by those who, in their official connection with the city, would be more likely to discharge them without difficulty and to the advantage of the public. But we look in vain for any provision of law which authorizes them to act in behalf of the city, either in making any contracts with the defendants, or in enforcing, in their names or in their official capacity, any contract created by law, with the city or the public, under the acts incorporating the defendants. If the conditions on which the location of the road or any part of it was granted to the defendants can be properly regarded as a contract — a point not necessary now to determine — it was not one to which the mayor and aldermen were a party, or which they are capable of enforcing. They were merely agents in prescribing the terms of such location, with specific and limited powers, and possessing no power or authority beyond those enumerated, among which is not included that of maintaining an action to compel the defendants to comply either with the terms of their charter or the conditions on which they were permitted to construct their tracks through the streets of a city. A remedy for any such violations of contracts or duty by the defendants cannot be sought by these plaintiffs.

The provisions of *St.* 1864, *c.* 229, §§ 26, 45, confer no power on the mayor and aldermen to maintain this bill.

Upon these grounds, without meaning to be understood that there are not other valid objections to the maintenance of these suits, we are of opinion that a decree must be entered sustaining the demurrer and dismissing these bills.

***Bills dismissed.***

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## Joseph R. Kendall *vs.* Frederick May.

Although a party to an action is insane, yet if he is competent to testify the other party may be admitted to testify in his own favor, under Gen. Sts. *c.* 131, § 14.

The finding of an auditor that an insane party to an action is competent to testify, and his admission of the other party to testify in his own favor, can only be controverted upon a hearing before the judge; and such hearing can only be had upon a motion addressed to the judge, prior to the trial before the jury.

If the guardian of an insane person has been removed and no new guardian appointed, one who at his request takes such insane person on a journey for pleasure out of the Commonwealth may recover of him the expenses thereof, provided that the jury find that they were reasonable and proper under the circumstances.

One who has long had the care of an insane person and provided for his table, and has been on several occasions and for a considerable period of time in another family while he was afterwards boarding there, may testify to an opinion as to the value of boarding and taking care of him in the latter place.

Contract against an insane person to recover for board furnished and services rendered to him, and expenses incurred for him.

The items of the plaintiff's account were quite numerous, and the case was referred to an auditor, who reported, among other things, that the plaintiff offered himself as a witness, and that the defendant, who appeared by his guardian and counsel, objected on the ground that the defendant was insane; but the auditor, after hearing testimony upon the subject, found that the mental condition of the defendant was not such as would incapacitate him from being a witness, and therefore held that Gen. Sts. *c.* 131, § 14,* did not apply to this case, and admitted the plaintiff to testify.

At the trial in the superior court, before *Brigham*, J., the plaintiff offered the auditor's report in evidence. The defendant objected to its admission, and offered to prove by medical experts that the defendant was insane at the time of the hearing before the auditor, and also at the time of the trial; but the

* This section, after enacting that parties in civil actions and proceedings shall be admitted as competent witnesses, provides "that where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the court to be insane, the other party shall not be admitted to testify in his own favor."

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judge excluded the evidence, and allowed the auditor's report to be read.

It appeared in evidence that the defendant was fifty-seven years of age; that he was of unsound mind, though capable of enjoying to some extent many pleasures and luxuries; that he was possessed of property to the amount of about $200,000, which yielded an annual income of from $10,000 to $12,000; that his near relatives were a brother and a married sister; that in 1844, at the death of his father, from whom he inherited his estate, he was decreed by the probate court to be *non compos mentis*, and was put under the guardianship of Joseph Ballard, who continued to be his guardian until he was removed by a decree of this court on the 17th of December 1862; that shortly after another guardian was appointed by the probate court, but the decree appointing him was reversed by this court, and on the 23d of June 1863 F. W. G. May, the present guardian, was appointed as guardian; that on the 3d of December 1862 the defendant was residing in Woburn, at the house of one Barrett, where he had been put by Ballard about three years before; that on that day the defendant left Barrett's house of his own accord, and applied to the plaintiff to take him into his own house and furnish him with board; that the plaintiff did so, and in February, at the defendant's request, the plaintiff and his wife went with the defendant on a journey of three weeks to Washington and other places out of this commonwealth, and the expenses of this journey are included among the items of charge now in suit. It did not appear that the plaintiff was authorized by any court, or by Ballard, or by the defendant's near relatives, to furnish the plaintiff with board or to take him upon the journey.

The defendant introduced evidence tending to show that suitable accommodations were provided and kept at Barrett's, to which the defendant might have returned at any time while he was at the plaintiff's house. The plaintiff introduced evidence tending to show that the defendant was discontented at Barrett's, and that he was more happy at the plaintiff's house, and that the keeping of the defendant at Barrett's was one ground of complaint against Ballard, when his removal was sought.

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The evidence was conflicting as to the value of the board furnished by the plaintiff. Sarah E. Skinner, a witness for the plaintiff, after testifying that the defendant boarded for many years in her mother's family, and that she herself had charge of him from 1853 to 1859 and during that time provided everything for his table, and that she now had charge of him, and that she was at the plaintiff's house on several occasions, and at one time several weeks, while the defendant was living there, was allowed, against the defendant's objection, to testify what in her opinion it was worth to board and take care of him at the plaintiff's house.

The defendant requested the court to instruct the jury that, under the circumstances proved, the journey taken by the defendant out of the state was not reasonably necessary for him, and that the plaintiff could not recover the expenses thereof; that the plaintiff could not properly take the defendant on a journey for pleasure out of the state, without the sanction of his former guardian, or of the court, or of his relatives; and that he could not recover for supplies furnished to the defendant unless Ballard neglected to provide reasonable supplies.

The judge declined so to rule, and instructed the jury that, to entitle the plaintiff to recover, the facts should show a necessity on the part of the defendant to which he in good faith had ministered; that this is not an absolute necessity, but a need which, considering the pecuniary ability, and physical and mental condition of the person, might be safely, reasonably and properly ministered unto, to promote his comfort, health and pleasure; and that if living at Barrett's caused him unhappiness, and he left there and went to the plaintiff's, and was there furnished with suitable board and attendance, the plaintiff might recover.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

*J. C. Davis*, for the defendant. When an auditor's report appears to have been founded on incompetent evidence, it should be rejected. *Putnam* v. *Dutton*, 8 Verm. 399. *Kendrick* v. *Tarbell*, 27 Verm. 512. *Boston Water Power Co.* v. *Gray*, 6 Met. 166. *Ward* v. *American Bank*, 7 Met. 489. *Jones* v. *Stevens*, 5

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Met. 377. The adjudication of the probate court appointing the guardian, and of the superior court admitting him to appear and defend the action, were conclusive evidence of the defendant's insanity. *White* v. *Palmer*, 4 Mass. 147. *Leonard* v. *Leonard*, 14 Pick. 284. The auditor's construction of Gen. Sts. *c.* 131, § 14, was erroneous. Many insane persons are competent to testify. 1 Greenl. Ev. § 365. *Fennell* v. *Tait*, 1 Cr., Mees. & R. 584. *Regina* v. *Hill*, 2 Den. C. C. 254. But such witnesses can testify ordinarily only to certain classes of facts. They may be able to appreciate and retain facts of the simplest kind, but numerous and complicated details, or facts happening at remote periods, become confused or entangled in their minds, or fade from them. And they are easily embarrassed, and are liable to be perplexed and disconcerted by questions of opposing counsel and the formalities of a trial, and betrayed into contradictions, and most of them are subject to the control of unfounded likes and dislikes, which impair the value and effect of their testimony. The statute was passed in view of the rule of law, which makes some insane persons competent to testify. It was intended to protect all insane persons.

Evidence was competent to control the auditor's finding, as to the defendant's capacity to testify. The report was only *prima facie* evidence. It was not necessary to raise the question before the trial. The defendant had no duty to do, in this respect, till the report was offered in evidence. He did not wish to have the report recommitted for a new finding by the auditor upon the matter.

The plaintiff, under the circumstances in which he stood towards the defendant, had no right to take the latter on a journey merely for pleasure, out of the Commonwealth. If he might take such a journey to Washington, he might also to Europe. See *Deerfield* v. *Greenfield*, 1 Gray, 514.

*T. H. Sweetser*, (*W. S. Gardner* with him,) for the plaintiff.

Chapman, J. It appears that the defendant is and for a long time and perhaps always has been a person of unsound mind. On the death of his father in 1844, from whom he received a large estate, he was placed under guardianship as a person non

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*compos mentis.* His guardian was dismissed in December 1862, and a new guardian was appointed in June 1863. About the time when the first guardian was dismissed, the defendant applied to the plaintiff to take him into his family. The plaintiff did so, and provided for him until the second guardian took charge of him. This action is brought to recover for the board and services thus furnished and the expenses of a journey.

The first question that arises in the case was originally made at the hearing before the the auditor. The plaintiff offered himself as a witness to prove his account. The defendant's counsel objected that he was not a competent witness under the provisions of Gen. Sts. *c.* 131, § 14, because the defendant was insane. The auditor overruled the objection, because upon due hearing he found as a fact that the mental condition of the defendant was not such as would incapacitate him from being a witness. The defendant's counsel contends that this ruling was erroneous; that the appointment of a guardian by the probate court, and the leave granted by the superior court to the guardian to appear and defend this action, were conclusive evidence of the insanity of the defendant, and that his mere insanity excludes the plaintiff from testifying.

There can be no doubt that where one party is insane to such a degree as to exclude him from being a witness, the statute does not intend to admit the other party. But it is not every degree of insanity that has this effect.

This question was thoroughly considered in *Regina* v. *Hill*, 15 Jur. 471, the same case being also reported in several other books. On the trial of an indictment for manslaughter, Coleridge, J. admitted a witness to testify who was brought into court from a lunatic hospital, and who labored under the delusion that he was possessed of twenty thousand spirits. In the court of criminal appeal this ruling was affirmed by Lord Campbell, C. J., Platt, Talfourd and Coleridge, JJ. The rule as they state it is, that it is for the judge to satisfy himself whether the witness understands the nature of the oath and is capable of testifying. He then decides upon the competency of the witness, and if he admits him it is left to the jury to estimate the value of his testimony.

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This is the only rational and just rule that can be adopted. Insanity exists in various degrees. Modern investigations have shown that it exists much more extensively than was formerly supposed, and that persons who are affected to such an extent that it is expedient to place them in insane hospitals or under guardianship often possess sufficient knowledge of the nature of an oath and of events that took place in their presence to make them useful and trustworthy as witnesses. A rigid rule that would exclude the testimony of all such persons as untrustworthy witnesses would not be conformable to facts, and therefore would not be founded in good sense. Nor would such a rule promote justice. It would leave insane persons needlessly unprotected in hospitals and elsewhere, and would deprive the public and individuals of their testimony in cases where it might be important and valuable. In commenting upon such a rule, Talfourd, J. remarked that Luther supposed he had conferences with the devil, and Dr. Johnson entertained delusions respecting his mother. Lord Campbell said that Socrates would not have been a witness under it, for he believed that a spirit always haunted him. In the case of *Commonwealth* v. *Reynolds*, which was an indictment for murder tried in Bristol in 1863, this court admitted an insane person to testify, adopting the principle laid down in *Regina* v. *Hill*. In *Leonard* v. *Leonard*, 14 Pick. 280, it is said that an insane person under guardianship may make a will, if of sufficient capacity. The reason for allowing him to testify, if he understands the nature of an oath and the facts which he relates, is at least as strong as for allowing him to make a will. The auditor therefore decided correctly the question of law in respect to the competency of an insane person to testify.

But having decided this, a question of fact was presented to him, namely, whether the defendant had in fact sufficient capacity to testify. He decided this question in the affirmative, upon the evidence before him.

Assuming then that the defendant was competent to testify he ruled that the plaintiff could testify under the statute. We think he also ruled this legal point correctly. The object of the

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statute is to make each party competent when the other is so, and not otherwise. Thus, if one party is dead, the other is excluded. If one is insane, the other is excluded; but the fair interpretation of the word "insane" is to be found by applying it to the subject matter. If he is so insane that he cannot be permitted to testify, he is within the reasonable interpretation of the statute, but not otherwise.

The auditor having made his report, it is made by statute *prima facie* evidence, and nothing more. The finding as to this fact of the capacity of the defendant to testify is not conclusive, but *prima facie* only.

In respect to the other facts found by the auditor, the report was to be submitted to the jury, and the evidence to contradict the report must be also addressed to them. But it was not so as to this fact; for the capacity of a witness to testify is not a fact that is ever submitted to the jury, but is always decided by the court.

When a question as to the admissibility of evidence is presented to the judge, he is often bound to hear and decide a collateral issue of fact, as whether a communication is confidential, or a witness is of sufficient capacity. *Cleave* v. *Jones*, 7 Exch. 421. It would be impracticable to submit these collateral issues to the jury. The auditor's finding on the point of capacity was to be affirmed or disaffirmed in this case by the judge, upon evidence to be presented to him. If it was affirmed, then the report was to be read to the jury; but if it was disaffirmed, it would not follow that the report was to be rejected, and the cause tried as if no report had been made; but the report should be recommitted for amendment, and for further hearing if necessary.

If either party desires to have a report recommitted on account of an erroneous finding of the auditor, he ought to make his motion seasonably, so that the recommitment may be made, and the report corrected before the trial. Otherwise the trial must be broken off, or the report excluded, and the cause tried without it. But the object of the statute is to aid the court and jury by obtaining the report of an auditor, and it is not in



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the power of either or both the parties to exclude it. The court may require it to be read. *Clark* v. *Fletcher*, 1 Allen, 53. If then either party desires to have the report corrected, on account of any error of fact or of law, he should move the recommitment, and have his objections settled before the cause goes to trial. To allow it to be done after the trial has commenced would create unreasonable inconvenience and expense, unless for good reasons which are satisfactory to the presiding judge. If no such reasons are presented, the objection should be considered as waived.

In the present case, the defendant's counsel objected to the admission of the report, and offered to prove by medical experts that the defendant was insane at the time of the hearing before the auditor, and also at the time of the trial. There was no motion to recommit the report, but merely to reject it. If the motion had been granted, the cause would have been tried to the jury, respecting an account containing a great number of items, and without the aid of an auditor's report. This would thwart the whole purpose of the statute. We think the court properly denied the motion to reject the report, and properly refused to hear evidence at that stage of the proceedings on the question whether the auditor had properly decided that the defendant was competent to testify.

The judge properly refused to instruct the jury that the journey taken by the defendant out of the state was not reasonably necessary for him, and that the plaintiff could not properly take him on a journey for pleasure out of the state without the sanction of his former guardian, or of the courts, or of his relations. His former guardian had nothing further to do with him. The interest of his relations was to keep his expenses as small as possible, in order that his property might be preserved for them or their children; and no court could determine beforehand what was proper to be done. The plaintiff incurred the risk of being able to satisfy a jury that the charges were reasonable and proper. The fact that the former guardian had provided rooms and necessaries for the ward was not material. The defendant's property amounted to about $200,000. If he had been *compos*

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*mentis* he would have had a right to use it to supply himself with luxuries, and to gratify his tastes and fancies, and even his whims. The fact that he was *non compos* made it proper to place him under guardianship, so that his estate should not be wasted, and he should not be left to suffer. But the object was to preserve it for his own use, and his own enjoyment of it should be considered as paramount to everything else. If without harm to himself he could enjoy luxuries and gratify his tastes and fancies, he ought to be indulged in such enjoyments to a reasonable extent. If he enjoyed journeys, it was proper that he should be indulged in them. If he preferred the society of some persons over that of others, that preference should be reasonably regarded and indulged. The interest which his heirs may have in the accumulation of his estate is to be wholly disregarded, when it comes in competition with his own happiness or innocent pleasure. It appears that he is capable of enjoying, to some extent, many pleasures and luxuries, and that he has preferences as to the place of his residence and his associates. Humanity and his right to his own property require that he should not be restrained or thwarted in his preferences and enjoyments, more than is necessary for his own welfare. *In re Persse*, 3 Molloy, 94, the Lord Chancellor said: "The maintenance of a lunatic is not limited as an infant's is, within the bounds of income. It is not limited except by the fullest comforts of the lunatic. Fancied enjoyments and even harmless caprice are to be indulged up to the limits of income, and for solid enjoyments and substantial comforts the court will, if necessary, go beyond the limits of income." In this commonwealth it is not thus limited in respect to an infant, and there is, therefore, less reason for limiting it in respect to a person of full age. The instructions of the court in regard to the allowance of the plaintiff's claims were correct in respect to these matters.

The opinion of Sarah E. Skinner as to what it was worth to board and take care of him was properly admitted. Opinions on questions of value, by persons who are acquainted with the subject as to which they testify, are always received. Her testimony shows that she had ample opportunity to form an opinion

*Exceptions overruled.*

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INHABITANTS OF SOUTH READING *vs.* WILLIAM HUTCHINSON & another.

Upon a complaint to compel kindred of a poor person to contribute towards his support, the superior court have power, under Gen. Sts. c. 70, § 11, to award costs, and no appeal lies from their decision.

COMPLAINT to compel children of Rebecca Hutchinson, a poor person, to contribute towards her support. After a hearing in the superior court, *Putnam*, J. ordered each of the defendants to pay a certain sum, with his share of the taxable costs. The defendants appealed from so much of the order as concerned costs.

*A. V. Lynde*, for the defendants.

*J. P. Converse*, for the plaintiffs.

BIGELOW, C. J. This is not a personal action in which the costs are regulated by Gen. Sts. *c.* 156, and the provisions contained in § 5 of that chapter are inapplicable to it. It is a proceeding of a peculiar nature, authorized by Gen. Sts. *c.* 70, § 5, *et seq.*, and a special provision on the subject of costs is made in § 11. It is there enacted that the court where the proceeding is pending "may award costs to either party, as justice requires." This gives a judicial discretion to the court respecting the subject matter, in relation to which we have neither the means nor the power to adjudicate. *Appeal dismissed.*

LUCRETIA E. JEWETT & another *vs.* JOSEPH DAVIS & others.

Under *St.* 1845, *c.* 208, a married woman to whom real estate had been conveyed, without words expressing that it was to be held by her to her sole and separate use, could not make a valid conveyance thereof without her husband's joining as a grantor; and a deed not so executed cannot be reformed in equity.

If the owner of the equity of redemption of mortgaged real estate pays the amount secured by the mortgage to the mortgagee, and fraudulently induces the latter to assign the mortgage to a third person instead of discharging it, neither the mortgagee nor one to whom he had agreed to assign the mortgage can maintain a bill in equity to set aside the assignment.

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BILL IN EQUITY by Lucretia E. Jewett and Sarah Eaton against Joseph Davis, Pamela E. Davis, Joseph B. Prince and George S. Cushing, to set aside an assignment of a mortgage of land, on the ground that one of the plaintiffs was fraudulently induced to assign instead of discharging it.

At the hearing, before *Gray*, J., it appeared that on the 11th of February 1856, William Fletcher conveyed the premises to Pamela E. Davis, wife of Joseph Davis, without any words showing that the same were to be held by her to her sole and separate use; and on the same day she and her husband executed to Fletcher, in due form, a mortgage thereof to secure the sum of $1200, as part of the consideration money, the rest being paid by Joseph Davis. On the 16th day of June 1858, possession was taken of the premises for the purpose of foreclosure for breach of condition of this mortgage, and on the 17th of April 1860 the mortgage was assigned to Mrs. Sarah Eaton, to hold the same to her sole and separate use, who held the same under an oral agreement to assign it to Lucretia E. Jewett, who furnished the money, borrowing a part of it for this purpose from Mrs. Eaton.

On the 16th of July 1857 a second mortgage of the premises was executed to Charles W. Jewett, which commenced thus: "Know all men by these presents that I, Pamela E. Davis, wife of Joseph Davis, of Charlestown, in the county of Middlesex, trader, in my own right, with the consent and approval of my said husband, testified by his being party hereto." The mortgage contained covenants by Mrs. Davis alone, with no further reference to her husband until the conclusion, which was as follows: "In witness whereof I, the said Pamela E. Davis, and I, Joseph Davis, husband of the said Pamela, have hereunto set our hands and seals," &c. This instrument was signed, sealed and acknowledged by both Mr. and Mrs. Davis, and on the 19th of March 1860 was assigned to Lucretia E. Jewett, to hold the same to her sole and separate use. All of the above instruments were duly recorded.

On the 15th of June 1861, the day before the foreclosure of the first mortgage was to become absolute, the defendants,

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Joseph Davis, Prince and Cushing, knowing of the second mortgage, and intending to bar the claims of all parties under it, induced Mrs. Eaton to accept the amount due thereon, and with her husband to execute an assignment thereof to said Cushing, by fraudulent representations that this assignment was only a discharge, and would not affect the second mortgage, and that they would lose both the money and the land unless they signed the assignment on that day. Within three days afterwards Mrs. Eaton discovered the fraud, and she and Mrs. Jewett tendered to Cushing the money which Mrs. Eaton had received, and requested him to reassign or discharge the mortgage; but he refused to do either. Mrs. Eaton and her husband thereupon executed an assignment of the mortgage to Mrs. Jewett.

The defendants, amongst other objections to the plaintiffs' recovery, contended that the second mortgage was void, because Joseph Davis did not join therein in the form required by law. The plaintiffs, not admitting this, asked that the mortgage should be reformed in this respect, if necessary; and it was agreed that this might be done, provided the court would so order, either upon an amendment of the present bill or upon a separate suit.

The case was reserved for the determination of the whole court.

*I. W. Richardson & H. Gleason*, for the plaintiffs.

*J. Q. A. Griffin & E. Pearson*, for the defendants.

Dewey, J. The position taken by the defendants that the second mortgage was void is well maintained. The premises thus conveyed in mortgage were held by Pamela E. Davis, by a conveyance made to her on the 11th of February 1856. This deed did not purport to convey the estate, to be held to her sole and separate use. The *St.* of 1845, *c.* 208, did not enable a married woman, without joining her husband as a grantor, to make a valid deed of land held by her under such a form of conveyance. *Gerrish* v. *Mason*, 4 Gray, 432. By the well settled principles of the common law, as long held and practised upon in this commonwealth, and subsequently confirmed by Rev. Sts. *c.* 59, § 2, a *feme covert* who owns the fee of land can convey the

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same only by a deed executed by herself and her husband, and when both are parties to the effective and operative part of the instrument of conveyance. *Lithgow* v. *Kavenagh*, 9 Mass. 161. *Bruce* v. *Wood*, 1 Met. 542. *Concord Bank* v. *Bellis*, 10 Cush. 276.

There is nothing in this case to impress upon the premises conveyed to the wife the character of a separate estate granted to her sole use. The case of *Whitten* v. *Whitten*, 3 Cush. 191, relied on as authority for the plaintiffs, presented a different question, and furnishes no sufficient precedent to govern the present case.

The further question is, whether the deed thus executed by the wife alone as the granting party can be reformed, and a new conveyance can properly be ordered by this court, in which the husband shall be described as a grantor as well as the wife, and whether such reformed deed shall operate retrospectively to charge the defendants in this case.

It was agreed by the parties at the trial that if the court could properly by an amendment of this bill, or by a distinct suit, so reform this deed, it might be considered as so done in the present case. It also appears from the evidence that it was the purpose in making the second mortgage to give a valid conveyance of the premises to the mortgagee to secure the payment of a promissory note for $1200, signed by both the wife and the husband.

The nature of the proposed alteration, and the effect to be given to it, forbid the reforming of the conveyance in the manner asked.

As already stated, this estate was so held by the wife as to render void any conveyance thereof in mortgage except by a deed executed by her jointly with her husband. Such estates have ever been held to be of such character as to forbid that any effect should be given to her sole deed, as well as also to preclude any exercise of authority by the court in equity to reform her conveyance, or give effect to any agreement to convey, when the instrument executed by her was insufficient in law to pass her title. There seems to be on this point a strong current

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of authority. Thus in 2 Kent Com. (6th ed.) 167, *note*, it is said that "an agreement by a *feme covert* with the assent of her husband for a sale of her real estate is absolutely void at law, and the courts of equity never enforce such a contract against her." 2 Story on Eq. §§ 1388–1391, is to the like effect; as are also the cases of *Watrous* v. *Chalker*, 7 Conn. 225; *Dickinson* v. *Glenney*, 27 Conn. 104; *Lane* v. *McKeen*, 15 Maine, 304; and *Purcell* v. *Goshorn*, 17 Ohio, 105, where the question of reforming an invalid deed of a married woman was fully and directly considered.

In reference to the separate property of the wife which is held exclusively to her own use, and which she may by virtue of our recent statutes convey by her own deed, with the written assent of her husband, a different rule would apply, and she may be required specifically to perform her contract, as was held in *Baker* v. *Hathaway*, 5 Allen, 103.

The mortgage deed to Charles W. Jewett, by virtue of which Lucretia E. Jewett claims an interest in the premises, being thus found invalid and of no effect, the plaintiffs must fail in sustaining their bill, if the existence of such second mortgage shall be found to be a material part of their case.

But it is said, in their behalf, that their right to maintain this bill does not depend upon the validity of the second mortgage. In the opinion of the court this position of the plaintiffs is not tenable. Mrs. Jewett, one of the plaintiffs, connects herself with the legal title solely as assignee of the second mortgage. Mrs. Eaton has received the whole amount due to her, and for which she held the assignment of the first mortgage as security. Mrs. Eaton has been in no way damnified.

The further inquiry is, whether the facts present a case entitling Mrs. Jewett to prosecute this bill in the name of Mrs. Eaton and herself for her own benefit, Mrs. Eaton having the legal title in the first mortgage, but holding it, as is alleged, in trust for Mrs. Jewett, subject to Mrs. Eaton's prior claim of $400. Suppose the defendants had only done what Joseph Davis and his wife had a legal right to do, namely, tendered payment in full of the first mortgage, and thus entitled

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themselves to have that mortgage discharged, Mrs. Jewett's situation would have been the same as it now is, so far as regards any security by force of the second mortgage. Suppose further that Mrs. Eaton had assigned to Mrs. Jewett the first mortgage, the effect would only have been to make her assignee of that mortgage, and the payment or tender of payment by Mr. and Mrs. Davis would have operated to discharge all her lien upon the premises.

It is true that such payment and discharge of the first mortgage would have left a valid title in Mrs. Davis. But that would not benefit Mrs. Jewett, or render the second mortgage available to her. Mrs. Jewett could only have been benefited by the mortgagors voluntarily permitting Mrs. Eaton to foreclose the first mortgage. This Mrs. Eaton could not require, and Mrs. Jewett, for whom it is alleged that she held the assignment of the first mortgage in trust, could not complain of the defendants for not allowing that mortgage to remain unpaid. Had Mrs. Jewett held a valid second mortgage of the premises, it would have been very material to her that the mortgagor in the first mortgage should be strictly confined to his legal rights to payment and discharge of the same, as thereby her second mortgage would at once attach, and she would have become entitled to the benefits of an unincumbered mortgage. The procuring of an assignment of the first mortgage by means of fraudulent representations that it was merely an instrument acknowledging a payment would have operated injuriously to her rights as second mortgagee. But if Mrs. Jewett holds no valid second mortgage, she cannot set up any fraud practised upon Mrs. Eaton of the character alleged, as affecting her rights as second mortgagee. All her legal rights as to the first mortgage, assuming that Mrs. Eaton held it in trust for her, have been fully enjoyed, and she and Mrs. Eaton have received the full sum secured by it. All the difference between the taking of the money by Mrs. Eaton as a payment of the mortgage, or the making of an assignment of the mortgage, as was done, was to place the legal title of the estate in the hands of Cushing instead of Mrs. Davis. But in neither case would Mrs.

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Jewett have been able to set up any title or estate in the premises.

It seems, therefore, that the validity of the alleged second mortgage is essential to the maintenance of this bill.

It becomes unnecessary to consider many other questions that were raised at the argument of this case, as this objection is fatal to the bill. *Bill dismissed.*

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JULIA STONE *vs.* CHARLES LANE.

If after the breach of the condition of a mortgage of land further advancements are made by the mortgagee to the mortgagor, under an oral agreement that the mortgage shall stand as security for them, a court of equity will not aid the mortgagor, or one who has no higher equity than the mortgagor, to redeem without allowing for such advancements.

If the assignees in insolvency of a mortgagor, by his request, and without objection from his creditors, convey to his wife an equity of redemption, without consideration and with notice, she, in seeking to redeem, will be subject to the same equities as he would have been.

HOAR, J. The plaintiff invokes the aid of a court of equity for the redemption of a mortgage. It is a familiar rule that he who seeks equity must do equity; and a court of equity will not assist any person to deprive the mortgagee of any security which he would have against the mortgagor, unless the equitable right of such person is distinct from and superior to that of the mortgagor. 2 Story on Eq. § 1023, *n.* 3.

This mortgage was made to secure the defendant for one half of the capital of $10,000 which he had agreed to advance for the use of the firm of Stone & Eldredge. That specific sum was never advanced by him. But it clearly appears by the report of the master that various advances were made, from time to time, which were regarded by the parties as made in performance of that agreement; the result of which was that, when Stone & Eldredge went into insolvency, one half of the joint indebtment of the firm to the defendant, secured by this note and mortgage for $1500, amounted to $2718.52, for which he held as additional security gas stock of the present value of about $2000.

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It was afterward orally agreed between the mortgagor Stone and the defendant, that the latter should buy up the claims of the creditors of the firm, and in consideration thereof should hold whatever should remain of the securities previously received by him after satisfying his existing claims thereon, for the purpose of indemnifying him for one half of the money he should expend in the purchase. He proceeded to buy up the claims accordingly, and, if the oral agreement is valid against this plaintiff, it will require the whole amount of the mortgage to indemnify him.

If, after such an agreement, and the performance of it, the mortgagor were seeking the aid of a court of equity to deprive the defendant of his security, its aid would certainly be refused. The recent case of *Joslyn* v. *Wyman*, 5 Allen, 62, is exactly in point, and contains a full statement of the reasons why equity, under such circumstances, would decline to interfere on behalf of the mortgagor, or any one claiming under him with notice, to aid in avoiding the contract.

It only remains, then, to see whether the plaintiff has any different or higher equity than that of the mortgagor. She derives her title directly from the assignees in insolvency of her husband. She is not a purchaser for a valuable consideration, but received the conveyance by her husband's procurement, neither of them paying anything therefor. Equity must regard the transaction as the same in substance as if the assignees had conveyed the equity of redemption directly to the husband. They were mere trustees; first, for the creditors; and next, if anything remained after satisfying the creditors, for the debtor. They have conveyed the estate by the debtor's appointment, and it does not appear that any creditor objects, or makes any adverse claim. The plaintiff, therefore, stands in no better position than her husband; and it would be wholly inequitable to allow her to redeem in violation of his contract. But the plaintiff has offered to pay whatever may be found due on the mortgage; and her bill may therefore be maintained as a bill to redeem.

The decree will therefore be entered that the plaintiff may

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redeem by paying the amount of the defendant's mortgage and interest, with costs; in default of which her right of redemption will be foreclosed.

*D. H. Mason & F. W. Hurd*, for the plaintiff.

*I. Story*, for the defendant.

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## Alvan W. Foss *vs.* Horace T. Hildreth.

Under Gen. Sts. c. 140, § 5, after a conditional judgment has been entered in an action to foreclose a mortgage, the court may submit to a jury a disputed question of fact as to the amount due on the mortgage.

If in such case the mortgage note bears an indorsement of $900, and the question in dispute is, whether that sum ought to be deducted or not, the submission to the jury of the following issues is unobjectionable: "Was the sum of $900 paid and received on said note? Was anything received or accepted on said note in satisfaction of the sum of $900?"

If the indorsement was made upon the settlement of an action of slander brought by the defendant against the plaintiff, for charging the defendant with keeping a gambling-house and a house of ill fame, and the settlement was effected while the plaintiff was drunk, by means of threats to arrest him on the writ, the plaintiff, for the purpose of showing his mental condition at the time, may prove that he had been drunk for a great part of the time for several weeks, at the defendant's house and with his knowledge. So also he may prove that the defendant in fact kept a gambling-house and a house of ill fame.

In an action for slander the truth of the words spoken is a justification, although they were spoken maliciously, and without any reason to suppose that they were true.

If a person has been induced by duress or fraud to settle a groundless suit against him, by indorsing a sum of money upon a note which he holds against the plaintiff therein, and he has taken a discharge of the suit, it is not necessary for him to give notice or to return the discharge, in order to entitle himself to avoid his contract.

A threat to arrest the defendant in an action for slander is a threat to make an unlawful arrest; and a contract procured by means of such a threat, if found by the jury to be sufficient to overcome the mind and will of a person of ordinary firmness, may be avoided.

Chapman, J. This is a writ of entry to foreclose a mortgage which was given to secure a note of $1600, dated July 26th 1858, and payable on demand with interest. After default the defendant moved for a conditional judgment. Several indorsements appeared upon the note, among which was one of $900 and this indorsement was the only matter in controversy. The plaintiff contended that it was not properly made, and ought not to be deducted, and upon his motion the presiding judge ordered

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the following issues to be tried by a jury, namely, "Was the sum of $900 paid and received on said note? Was anything received or accepted on said note in satisfaction of the sum of $900?"

The defendant excepts to this order and direction of the judge, on the ground that the questions submitted to the jury ought to have been decided by the court, and cites Gen. Sts. *c.* 140, § 5, in support of this exception. It is there provided that "the court shall inquire and determine how much is due to the plaintiff on the mortgage." But in *Slayton* v. *McIntyre*, 11 Gray, 275, it was held that the judge might make this inquiry by a jury, if there was any fact in controversy that he might deem of such a character as to require the intervention of a jury. It is of much practical importance that he should possess this power. The defendant further contends that the issues as framed were not pure issues of fact, and that they were put in such a form that they tended to mislead the jury. But we see no valid ground for this objection.

The indorsement has no date, but the evidence tended to show that it was made on the 27th of February 1863. All the evidence which was admitted is reported in the bill of exceptions. It was offered by the plaintiff, and the case was submitted to the jury without the offer of any evidence on the part of the defendant. The general object of the evidence was to establish the following facts: The plaintiff, who is an inhabitant of New Hampshire, came to the defendant's house in Natick about the first of February 1863. It was a public house of entertainment, and called the Lake Shore House. The plaintiff repeatedly requested the defendant to pay him a part of the money due on the note; but the defendant made excuses and delayed payment. On the 23d of February the defendant sued out a writ against the plaintiff for slander, in calling his house a gambling-house and a house of ill fame, laying his damages at five thousand dollars. On the 27th of February he procured a deputy sheriff named Bannister to come to his house, and put the writ into his hands. Bannister went to the plaintiff's room in the morning, where he was shaving himself, and pretended that he

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was going to commit him to jail. The defendant and Bannister then went with the plaintiff to the office of the defendant's attorney, where the action and the defendant's claim for slander were settled, and were discharged by the defendant, and in consideration of this settlement and discharge the indorsement of $900 was made on the note. The plaintiff had been staying at the defendant's house, and had been for a great part of the time in a state of intoxication, and was so at the time of the settlement. The action was groundless, and the settlement was procured by fraud and duress, and was made while the plaintiff was in such a condition as to be incompetent to make a valid agreement. Some of the evidence which was offered to sustain these positions was objected to.

1. It was objected that the evidence was inadmissible which was offered to prove that the plaintiff had been intoxicated prior to the day of the settlement and indorsement. But this evidence tended, in connection with the evidence as to his intoxication on that day, to show what his mental condition then was. The jury would be able to judge, from their own observation and knowledge, of the extent to which it had affected and weakened his mind, and rendered him imbecile. And as the liquor was obtained at the defendant's house and with his knowledge, the evidence had some tendency to show, in connection with other circumstances, that the action of slander was groundless, and that the claim and settlement were fraudulent on the part of the defendant.

2. It was objected that the evidence was inadmissible which tended to prove that the defendant did in fact keep a house of ill fame and a gambling-house. But inasmuch as the evidence tended to prove the truth of the words which the defendant was charged with having spoken, it tended to show that they were not slanderous, and that the defendant's action was groundless. And as it tended to prove that the defendant knew the words to be true, and therefore knew that his action was groundless, it tended to show that his claim was fraudulent, and was got up with a view to avoid the payment of his note. The evidence was therefore pertinent and admissible.

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After the evidence was in, the defendant's counsel requested the court to instruct the jury that there was no competent evidence of duress, fraud or intoxication. The evidence being reported to us, we are all of opinion that it was competent for the jury to find upon it that there were fraud, duress and intoxication, sufficient to make the transaction void. The plaintiff testified in the case, and it is contended that his statements are not worthy of credit. But the credit of a witness is a question for the jury, and not for the court; and the jury would be likely to be influenced by the fact that neither the defendant nor Bannister nor the defendant's attorney was called to contradict his statements; but they were all left uncontradicted, and they were also corroborated by other evidence.

The defendant's counsel further requested the court to instruct the jury that the evidence was not sufficient or competent to prove that the defendant kept a gaming-house or a house of ill fame. The court are of opinion that the evidence as reported is sufficient to prove that the defendant kept a public house with the intent that it should be resorted to by prostitutes for the purpose of prostitution and by gamblers for gaming, and thereby to increase his profits; and that it was so resorted to with his knowledge. The details are too indecent to be stated. The transactions which appear in evidence were so open and notorious that the jury could hardly suppose the defendant really felt aggrieved or injured by having his house called a house of ill fame and a gambling-house.

The defendant's counsel requested the court to give certain instructions to the jury, as stated in the bill of exceptions. One of the instructions prayed for was, that the truth is not a defence to an action of slander, if the words were spoken maliciously or without any reason on the part of the defendant to believe they were true. But in respect to verbal slander the law has always been otherwise. A special plea in justification sets forth the truth of the words merely. 3 Chit. Pl. 1031.

The instructions that were given in respect to the degree of imbecility or intoxication which must exist in order to avoid a contract were in substantial conformity to those prayed for.

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The jury were also instructed that the contract was voidable and might be avoided. They were not instructed that it was necessary to give notice to the defendant or to return the discharge, in order to avoid the contract. No such acts were necessary. The discharge is not property of any value to the defendant, nor is it of any use to the plaintiff.

It is also true that where a person *non compos mentis* makes a deed and receives a valuable consideration for it, he or his guardian may avoid it without first returning the consideration. *Gibson* v. *Soper*, 6 Gray, 279.

The instructions in regard to duress were also correct. These instructions were that a threat to make an arrest upon the writ for slander would be a threat to make an unlawful arrest; and that an acknowledgment obtained under terror of an unlawful arrest, such as under all the circumstances was sufficient to overcome the mind and will of a person of ordinary firmness, might be avoided. By Gen. Sts. *c.* 124, § 3, it is provided that no person shall be arrested on mesne process in a civil action for libel or slander; and the threat to commit the plaintiff to jail unless he settled the action was for the evident purpose of leading him to believe that he was in the custody of the officer, and extorting the indorsement from him in order to obtain a release.

The whole evidence being reported to us, we are satisfied that the verdict is right. *Exceptions overruled.*

*C. R. Train & J. W. Bacon*, for the defendant.

*T. H. Sweetser & W. S. Gardner*, for the plaintiff.

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## Thomas Bryant *vs.* Henry M. Pollard.

A mortgage of personal property made to secure an indorser of a note is not discharged by the indorser's lending to the mortgagor money which is applied to the payment of the note, unless the parties intend that the mortgage shall be thereby discharged.

No action lies to recover the price of mortgaged personal property sold in violation of Gen. Sts. c. 161, § 62, and returned by the purchaser to the seller.

Chapman, J. This action is brought to recover the price of a cow which was sold by the plaintiff to the defendant. The defendant returned the cow to the plaintiff after the sale and delivery, and refuses to pay for her. One of the grounds of his defence is, that at the time of the sale she was under a mortgage to one Newton.

It appears that the sale to the defendant was on the 28th of March 1863. About the 1st of June 1862 the plaintiff had applied to Newton to indorse a note for him, in order that he might get it discounted at a bank. It was a note payable to the plaintiff, and indorsed by him. Newton became the second indorser, and took a mortgage of the cow and some other property as his security. Before the note became due the plaintiff informed Newton that neither the maker nor the plaintiff would be able to take up the note, and that he would need Newton's aid in raising the money. Newton gave him the money, and he paid the note with it. He contends that this was a mere loan by Newton to him, and that by taking up the note he discharged the mortgage. This would be so if the parties so intended it. But such might not be their intent. Newton was liable to have his name dishonored at the bank, and to pay the note; and if he chose to advance the money for its payment, and prevent its being protested, he might do so, and might furnish the money to the plaintiff for the purpose without discharging the mortgage. The question of intent was submitted to the jury, and they have found against the plaintiff. The mortgage then remained in force, and it had not been discharged prior to the sale of the cow to the defendant, because the plaintiff had not paid the note prior to that time. *Davis* v. *Maynard*, 9 Mass. 242.



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*Watkins* v. *Hill*, 8 Pick. 522. *Pomroy* v. *Rice*, 16 Pick. 22. *Grimes* v. *Kimball*, 3 Allen, 518.

By Gen. Sts. *c.* 161, § 62, it is made a crime for a mortgagor of personal property to sell or convey the same without the written consent of the mortgagee, and without informing the person to whom the sale or conveyance is made of the mortgage. In this case there was no consent of the mortgagee to the sale, nor any information of the mortgage to the defendant. He had a right, therefore, to treat the sale as void, because it was made in violation of law.

It is not necessary to consider the questions that have been raised in regard to the warranty. *Exceptions overruled.*

*J. Rutter*, for the plaintiff, cited *Abbott* v. *Upton*, 19 Pick. 434.

*W. F. Slocum*, for the defendant.

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HENRY PARKER *vs.* ALBERT COBURN.

An agreement, made for a valuable consideration, to pay a certain sum of money at the promisor's death, with a gross sum for interest thereon, is valid and binding upon his executor, and is not usurious, although at his death the legal interest would not amount to so much as the sum named for interest.

If a person has promised to pay a certain sum of money at his death, with a gross sum for interest thereon, a legacy by him to his creditor, equal in amount to the principal sum, is not to be applied in payment thereof, unless the will shows that such was the intent of the testator, and is therefore inadmissible in evidence, in an action against his executor upon the promise.

In an action to recover a certain sum as the price agreed to be paid for land, if the amount is in controversy, the defendant may prove that the plaintiff had previously conveyed away the right to cut the wood off from the same, and that therefore the value of the land conveyed was less than the sum claimed by the plaintiff as the price agreed to be paid.

CONTRACT brought against the executor of the estate of Jonathan Parker, to recover $600 as the balance due for one undivided half of a parcel of land sold by the plaintiff to said Parker.

At the trial in the superior court, before *Putnam*, J., the plaintiff

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introduced evidence tending to show that in April or May 1856 John Parker, who died in 1862, and who was his father, purchased the interest in the land of him for $1500 in cash, and "$500 and $100 for interest on it" at his [John's] decease, saying at the time that "there was no probability of the interest being over $100, as he was so old;" and that the wood upon the whole land was worth $1000, and half of the land was not worth $2000, without the wood. The deed of the plaintiff to his father mentioned $1500 as the consideration thereof. The defendant denied that the testator agreed to pay over $1500 for the conveyance.

The defendant offered in evidence two deeds, both executed in July 1841, one of which was a conveyance by the testator to the plaintiff of one undivided half of all his real estate; and the other a reconveyance of the same to the testator for his life, with the right "to cut and dispose of the wood and timber growing on said lands, without liability for waste." This evidence was rejected. The defendant offered in evidence an attested copy of the will of his testator, one clause of which was as follows: "To my son Henry I give the sum of five hundred dollars." This evidence was rejected.

The jury returned a verdict for the plaintiff for $600 and interest from the date of the writ, under instructions authorizing them to do so, and the defendant alleged exceptions.

*D. S. Richardson*, for the defendant.

*T. H. Sweetser*, (*W. S. Gardner* with him,) for the plaintiff.

Gray, J. The evidence introduced by the plaintiff tended to prove, and the jury have found, that John Parker agreed to pay to his son, the plaintiff, as the price of one half of a farm, $1500 in cash, and at his death the further sum of $500, "and $100 for interest on it."

1. This agreement, made for a valuable consideration, to pay a certain sum of money at the time of the promisor's death, was not in the nature of a testamentary gift, but was a valid contract binding on his executor, the defendant. *Jenkins* v. *Stetson*, 9 Allen, 132.

2. The conveyance of the land having been executed, the

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promise to pay the price was not within the statute of frauds. *Nutting* v. *Dickinson*, 8 Allen, 542, and cases cited.

3. There is no ground for the suggestion of the defendant that the contract was usurious. The testator did not agree to pay more than the lawful rate of interest on so much of the purchase money as was to be paid at a future time; but to pay in addition to that part of the purchase money a certain sum, which might or might not exceed the amount of interest if computed at the lawful rate, according to the length of life of the testator after making the promise. The sum of $100, though called "interest," was not paid for a loan of money, but was a part of the purchase money which the defendant at the time of the bargain agreed to pay. And there is no evidence whatever that the transaction was intended as a cover for a loan. *Beete* v. *Bidgood*, 7 B. & C. 453; *S. C.* 1 Man. & Ry. 143.

4. The legacy of $500 in the subsequent will of the father was rightly held to be inadmissible in evidence of a satisfaction of this debt of $600 or any part of it. The debt to the son was contracted for a valuable consideration and stood upon the same footing as a debt to a stranger. The legacy was in the ordinary form of a simple gift, without any reference to the defendant. A debtor cannot oblige his creditor to be satisfied with receiving less than his whole debt; and it would be a forced construction to hold that the testator intended to pay all of his debt except the part which he called "interest," leaving that in force. A legacy to a creditor of a sum less than his debt is not to be applied towards payment of the debt without clear evidence of the testator's intention that it should be. *Strong* v. *Williams* 12 Mass. 390. *Smith* v. *Smith*, 1 Allen, 130. *Tolson* v. *Collins* 4 Ves. 490, 491. *Thynne* v. *Glengall*, 2 H. L. Cas. 153. 2 Story on Eq. §§ 1104, 1122.

5. The defendant in his answer put in issue the making of the contract alleged by the plaintiff, and averred that the testator never agreed to pay more than $1500 for the land. That sum was the consideration named in the deed to him from the plaintiff. The testimony of one of the plaintiff's witnesses tended to show that the half of the farm was not worth $2000 without

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the wood, and that there was $1000 worth of wood standing on the whole farm, or $500 to each undivided half. The deeds offered in evidence by the defendant showed that the plaintiff had some years before conveyed to his father the right to cut the wood, and were material evidence upon the question what price he agreed to pay for the land. *Bradbury* v. *Dwight*, 3 Met. 31. Those deeds having been excluded by the presiding judge, the defendant is entitled to a new trial. *Exceptions sustained.*

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JAMES HARRISON *vs.* ELIZABETH CONLAN.

If in a particular religious denomination the pastor furnishes the organist, and accordingly agrees with an organist for a certain time at a specified price, and dies before the expiration of the time, and the church is subsequently closed, his estate is only liable to pay for the time of the organist's actual services, with interest after a demand; although the organist was ready to play afterwards.

CONTRACT against the administratrix of the estate of James T. McDermott, upon a promissory note of $200; an account annexed, upon which it was conceded that $180 was due; and upon a contract to pay the plaintiff for his services as organist in St. Mary's Church in Lowell.

Concerning the last item of claim, it was agreed in the superior court that about the 1st of January 1862 the plaintiff agreed with the defendant's intestate to play the organ in that church for three months, for which the latter agreed to pay fifty dollars. McDermott was of the Roman Catholic faith, and was and for several years had been the sole pastor of the Catholic congregation worshipping in that church, and during most of the time the plaintiff had been his organist. In pursuance of the contract the plaintiff entered upon his duties as organist, and continued to perform them till McDermott's death, about the 1st of February 1862. He was always ready to play the organ afterwards, during the remainder of his time, but the church was not afterwards opened, except on the occasion of McDermott's funeral. In Catholic churches the organist is furnished by the

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pastor, and the pastor can only be appointed by the bishop, and no successor to McDermott was appointed. It was agreed that, if the court should be of opinion that the contract was ended by McDermott's death, the plaintiff should recover $16.67, with $5 more for playing at the funeral; or otherwise $50. No demand of payment was made before the commencement of this action, but the plaintiff claimed interest from McDermott's death.

Upon these facts, judgment was rendered for $50, in addition to the other items concerning which there was no dispute, with interest from the date of the writ; and both parties appealed to this court, the plaintiff appealing on the question of interest.

*J. C. Kimball*, for the plaintiff.

*D. S. Richardson*, for the defendant.

METCALF, J. It is a general rule of law that the legal representatives of a deceased person — his executors or administrators — are bound to perform his contracts, and are liable to actions for his breach of them. But there is an exception to this rule when the contract of the deceased requires, from its nature or for other reason, to be performed by him, or to him, personally; as if he engages to compose a book or to make a painting or engraving, or engages to pay another, during a specified time, for attending on his person and for no other service. In these and like cases his representatives are held answerable for breaches of his contract during his life, and not for breaches thereof after his death. His death ends such contracts, and those who contracted with him can recover of his representatives only *pro rata* damages or *pro rata* compensation. By Baron Bayley, 1 Tyrwh. 350. By Baron Parke, 1 M. & W. 423, and 4 Exch. 866. By Chapman, J., 6 Allen, 129. 2 Williams on Executors, (4th Amer. ed.) 1467. Addison on Con. (2d Amer. ed.) 1060, 1061. *Dickinson* v *Calahan*, 19 Penn. State R. 227. *White* v. *The Commonwealth*, 39 Ib. 167. *Knight* v. *Bean*, 22 Maine, 536. *Fenton* v. *Clark*, 11 Verm. 563. Chit. Con. (10th Amer. ed.) 101, 804. Such is the uniform course of decisions, though there is not an entire uniformity of judicial opinion as to the contracts which fall within the exception to the above mentioned acknowledged general rule concerning the liability of executors and administrators.

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The present case seems to us to be that of a contract by the plaintiff to render personal service, and no other, to the defendant's intestate, for three months, for fifty dollars; that by the intestate's death at the expiration of one month the contract was ended, and further service under it rendered impossible; and that, according to the foregoing authorities, the plaintiff is entitled to recover only *pro rata* compensation, to wit, for one third of fifty dollars — $16.67.

It appears, from the facts on which the parties have agreed, that the defendant's intestate, when he contracted with the plaintiff, was sole pastor of a Catholic congregation, and that in Catholic churches the organist is furnished by the pastor. We infer from this that the pastor has the direction of the use of the organ in public worship, no less than he has charge of the offering of prayers and of the imparting of religious instruction, and that the services of the organist are rendered to him personally as conductor of the worship of the church.

In the case before us, the pastor appointed the plaintiff as organist, and made himself personally answerable to pay him, as he would have done for any other service to him personally. He "furnished" the plaintiff as organist, who had, for several previous years, been "his organist."

The ruling of the judge of the superior court as to interest on the plaintiff's account annexed to his writ was right, namely, that it was recoverable only from the commencement of the action. Payment was not wrongfully withheld, until after demand of payment, and demand was first made by commencing the action. *Hunt* v. *Nevers*, 15 Pick. 505. *Goff* v. *Rehoboth*, 2 Cush. 478.

The only change that we make in the judgment appealed from is in the sum which the plaintiff is to recover for his service as organist, namely, $16.67, instead of $50. We have not inquired whether the defendant would be legally answerable for the plaintiff's services at the funeral of the deceased, ($5.00,) because the parties have agreed that this shall be recovered, if the plaintiff's contract was ended by the death of the intestate.

Judgment is to be entered for the plaintiff for the amount of

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principal and interest on the note for $200, which was made payable with interest; for $180 on the account annexed to his writ; and $16.67 and $5, for services as organist, and interest on the last three sums from the commencement of the action.

## City of Lowell *vs.* Benjamin F. Simpson.

If, under a charter authorizing the same, a city ordinance is passed which prohibits the obstruction of any street for the purpose of building, "without first obtaining a written license from the mayor and aldermen, or some person authorized by them," and complying with such reasonable conditions as they may impose, the mayor alone has no authority to grant a license to obstruct a street for the purpose of building, or to impose conditions therefor; and an agreement, made in consideration of such license from the mayor alone, to indemnify the city against damages that may arise in consequence thereof, is without consideration and void.

Contract, upon the following agreement:

"City of Lowell. B. F. Simpson having signified to the mayor and aldermen his intention to build in Bridge Street, license is hereby granted to him to occupy and use, for the term of four months from date hereof, twenty-five feet outside of the line of the building, on the following conditions, to wit: that the said Simpson shall keep the same inclosed by a proper fence, and sufficiently lighted at night to secure the safety of passengers on said street, and that when his occupancy shall have terminated he shall leave the same unincumbered by any rubbish whatever. Said Simpson furthermore shall fully indemnify the city for any damages or costs that may arise in consequence of such occupancy of the street. B. C. Sargeant, mayor.

"Mayor's Office, Aug. 4th 1860. I agree to the conditions of the above license. Benja. F. Simpson."

The declaration alleged that the defendant did not keep this agreement, or keep Bridge Street inclosed or lighted, as therein provided, by reason of which Polly H. Wright met with an accident there, and recovered judgment against the city for $1092.03 therefor.

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The defendant demurred to the declaration, assigning as causes, amongst others, that the mayor had no authority in the premises, and the declaration alleged no authority in him. It was agreed that the city ordinances of Lowell might be referred to, and the case was reserved by *Gray*, J. for the determination of the whole court upon the question whether the declaration could be sustained either in its present form, or with any amendments thereof. The city ordinances and proposed amendment are sufficiently stated in the opinion.

*T. Wentworth*, for the plaintiffs.

*A. F. Jewett*, for the defendant.

Gray, J. The ordinances of the city of Lowell, in force at the time of the making of the agreement declared on, prohibited the obstruction of any street for the purpose of building, "without first obtaining a written license from the mayor and aldermen, or some person authorized by them," and faithfully complying with such reasonable conditions as "said board may impose." Revised Ordinances of Lowell of 1854, *c.* 24, §§ 1, 5. This ordinance was clearly reasonable and proper, and within the power conferred on the city council by the city charter, to make "salutary and needful by-laws." *St.* 1836, *c.* 128, § 8. *Pedrick* v. *Bailey*, 12 Gray, 161. The only consideration for the defendant's agreement to indemnify the city against damages caused by his occupation of Bridge Street was a license signed by the mayor alone, containing nothing to show that he was authorized by the mayor and aldermen to give it. There is no allegation, either in the declaration already filed, or in the amended count which the plaintiffs have moved for leave to add, that he was so authorized. Such an authority cannot be implied from the fact of his being mayor. In the absence of such authority, the license was void. *Day* v. *Green*, 4 Cush. 433. This ordinance of the city could not be annulled or dispensed with by the individual act of the mayor as one of the surveyors of highways, elected under the act, amending the city charter, of 1846, *c.* 35, § 4. There being no consideration for the defendant's agreement, he is not liable to this action.

*Demurrer sustained; judgment for the defendant.*

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## Charles W. Green *vs.* Henry Clay.
## Same *vs.* Thomas Cox.

In the absence of a known contract to the contrary, a person put in charge of a saw-mill by the owner or lessee thereof may lawfully receive payment in money or otherwise for lumber sawed by him at the mill. And evidence of a custom in former years to make such payments to other persons so put in charge of the mill is competent.

The refusal of a judge to make a special inquiry of a jury, on the morning after they had rendered their verdict, and after their separation, as to their finding upon a particular point, furnishes no ground of exception.

Two actions of contract to recover compensation for sawing lumber at the plaintiff's mill. The answers denied the making of any contract therefor with the plaintiff, and averred that the contract for the same was made with one Jenkins, who had the use and occupation of the mill, and to whom the defendants had made payment, by work done for him. Declarations in set-off were also filed, with items for services rendered and materials furnished.

The cases were tried together in the superior court, before *Brigham*, J., and it appeared that in January 1861 the plaintiff became the lessee of the mill, and employed as his agent Adams Wiley, who had carried it on for eight years before, and who let it for the plaintiff to one Anderson until the winter of 1862–1863, when he let it to Henry Jenkins, upon the terms that Jenkins should furnish all the labor and half of the oil and files, and make all small repairs, and have half of the earnings, and of the chips, bark and sawdust. The evidence was conflicting as to whether Jenkins should collect all the bills, Wiley testifying that Jenkins was only to collect a few small outside bills in Melrose and Saugus. The sawing for the defendants was done during the continuance of the lease to Jenkins.

The defendants introduced evidence, under objection, tending to show that they and other persons had paid to Anderson, while he carried on the mill, for sawing done by him there, in materials, labor and provisions. They also introduced evidence tending to prove the items for labor and materials, mentioned in their declarations in set-off, as having been rendered and

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furnished chiefly to Jenkins, but in part to Wiley, at a time when he was in charge of the mill while Jenkins was sick. The judge ruled that no labor performed for Jenkins or materials furnished to him could be allowed in set-off, but the same, so far as they had been received and allowed by Jenkins in payment for sawing done by him there, might be considered in support of the plea of payment, and any labor or materials furnished to Wiley acting as the plaintiff's agent in running the mill might be considered in set-off.

The judge also instructed the jury as follows:

"If there was, known to the defendants, a contract between Wiley, acting as the agent of the plaintiff, and Jenkins, that Jenkins should not collect the price or fees of sawing, a payment by either of the defendants to Jenkins would not be a defence to their liability to pay to the plaintiff for sawing done by Jenkins under such a contract. A custom, existing for a series of years, and uniform and known and acted upon by the defendants, as to the time of paying for sawing at this mill, and the person collecting the price or fees of such sawing, which is in conformity with the contract as claimed by the plaintiff, would be evidence tending to show that they knew that Jenkins was not authorized to collect such price or fees, or, if authorized to collect such price or fees, not authorized so to do until the end of the milling season. If Jenkins, as the defendants knew, was not authorized to collect of them the price of sawing done for them, their payments to him will not operate as defences to this action. But if Jenkins was authorized to collect the prices of sawing, and collected these of the defendants, before the time when he was authorized to do so, with the knowledge of the defendants, such collections will protect the defendants as payments. In the absence of such knowledge, Jenkins, if the mill was let to him, or he was employed to run it by Wiley, as the agent of the plaintiff, on shares, by virtue of such a letting or employment, might collect, and the defendants might pay to him, he price or fees of sawing done at the mill by him for them, and such payments would be defences to these actions; and the performance of labor by the defendants, by agreement with said

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Jenkins, in compensation for such sawing, or the furnishing of merchandise to said Jenkins, in compensation for said sawing might by the agreement of the defendants with Jenkins become payments which would operate as defences to these actions."

The jury returned verdicts for the plaintiff, with $3.19 damages in the first action, and $14.15 in the second; and found specially that "by the contract between Jenkins and Wiley, acting as the agent of the plaintiff, Jenkins did not agree not to collect any but small outside bills." These verdicts were returned at half past six in the afternoon, the counsel of the parties not being present; and the next morning, at the opening of court, the plaintiff requested the court to inquire of them "whether they found the sums claimed in the defendants' declarations in set-off, or on payment." The judge declined to put the inquiry to them.

The plaintiff alleged exceptions.

*A. V. Lynde*, for the plaintiff.

*C. P. Judd*, for the defendants.

CHAPMAN, J. The facts in these cases are not very clearly stated in the bill of exceptions. The plaintiff appears to have been the lessee of the saw-mill in question, and to have employed one Wiley, who had for many years managed it, to act as his agent. Wiley let it for some years to one Anderson, and in the winter of 1862–1863 let it to Henry Jenkins. The terms of this letting were, that Jenkins was to furnish the labor and certain other things, and have half the earnings, and half the chips, bark and sawdust. Whether he was to collect the earnings and pay half to the plaintiff, or the plaintiff was to collect them and pay half to him, was a matter in dispute; but the jury found specially that Jenkins did not agree that he would not collect them. Jenkins appears to have had charge of the whole business, and it does not appear that any of the customers had notice that the plaintiff had any interest in the matter before the business was closed.

The present actions are brought to recover compensation for sawing done by Jenkins for each of the defendants. Under such a contract as is stated in the bill of exceptions, it is difficult

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to see how the plaintiff can maintain the actions; but no exception is taken on this point. Clearly there is no ground on which it can be contended that the defendants had not a right to contract with Jenkins for sawing, and pay him for the work. The instructions to the jury were sufficiently favorable to the plaintiff on this point.

The evidence that it had been the custom in former years to make payment to those persons who had occupied the mill under contracts with Wiley was not material; but it was not inadmissible. If it had appeared that Jenkins had made a private contract with the plaintiff that he would not collect the bills for sawing, of which contract the defendants were ignorant, the defendants might have been justified in making payment for sawing to the person who had charge of the mill, as they and others had been accustomed to do in former years. But in the absence of any such agreement on the part of Jenkins, his right to receive payment would result legally from his contract.

The plaintiff's counsel requested the presiding judge to inquire of the jury "whether they found the sums claimed in the defendants' declarations in set-off, or on payment." The judge declined to make the inquiry, and his decision is excepted to. It is not unusual, and it is often very convenient, in our system of practice, to make inquiries of the jury in respect to their findings of particular facts. But these inquiries are always made when they render their verdict, and before they separate. After they have rendered it and separated, it would be unsafe to permit such inquiries to be made; for the jurors are no longer under restraint, as to conversing with any person or hearing the conversation of any person in regard to the case. The plaintiff's request was not made till the morning after the jury had rendered their verdict and separated. This was too late. The judge had no discretionary right to make the inquiry at that time, without the consent of both parties.

But we cannot see how the question was material. It is stated that the court ruled that no labor performed for Jenkins, or cash paid or materials furnished to him, could be allowed in set-off; but the same, so far as they had been received and

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allowed by him in payment for sawing done, might be considered, in support of the plea of payment. Under this instruction all that was allowed must have been received by him in payment, and the account in set-off was excluded.

The question of what costs the plaintiff is entitled to recover has been argued, but it is not brought here by the bill of exceptions. The case is not here, but merely the questions stated in the bill. But under the instruction above mentioned, it is difficult to see how any question as to costs can arise.

*Exceptions overruled.*

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JOSEPH P. SILSBY *vs.* ALBERT BULLOCK.

A married woman may, by a will duly executed with her husband's written assent, dispose of all her real estate, so as to cut off his right as tenant by the curtesy.

WRIT OF ENTRY to recover a dwelling-house and lot in Cambridge.

It was agreed, in the superior court, that the premises were the sole and separate property of the tenant's wife, who by her will duly executed and proved, by her husband's written assent, devised the same to the tenant in trust, for the use of her four children. After her death the demandant recovered judgment against the tenant upon a note, and levied the execution upon the tenant's alleged estate as tenant by the curtesy of the premises.

Upon these facts, judgment was ordered for the tenant, and the demandant appealed to this court.

*A. Russ*, for the demandant.

*J. L. English*, for the tenant.

BIGELOW, C. J. The power of a married woman to dispose of the real estate which belongs to her in her own right as her sole and separate property by a last will duly executed is clear and unquestionable. It is expressly conferred by Gen. Sts c. 108, § 9. The only limitation on this power is that which is

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expressed in § 10 of the same chapter, which provides that the will of a married woman devising her separate real estate shall not operate to impair or destroy her husband's right as tenant by the curtesy without his written assent. This affords a clear and direct implication that with such assent her will may be effectual to cut off his right to hold her real estate after her death during his own life as tenant by the curtesy. The manifest intention of the legislature in enacting the provisions contained in Gen. Sts. *c.* 108, §§ 9, 10, was to confer on a married woman full testamentary capacity as to her separate estate, both real and personal, with two exceptions only. These exceptions were intended for the benefit of the husband. They restricted her authority as to the personal estate, by providing that she should not dispose of more than half of it without her husband's written assent; and as to the real estate, that she should not impair his right as tenant by the curtesy without a similar assent. But with such assent, there is no restriction on her authority to dispose of her real and personal estate by will in the same manner as if she were sole. When therefore a husband assents in writing to a will, executed by his wife, of her separate estate, unless such assent is qualified or limited, the will is valid and effectual to pass all her real and personal estate, to the extent to which the devises and bequests therein contained dispose of the property. The assent can have no other effect or operation. It is not necessary, as has been already stated, to the validity of the will. This has effect and operation to a certain extent without the husband's assent. It is otherwise with respect to deeds of the separate real estate of a wife. By the provisions of § 3 of the same chapter, these are not valid even to convey the wife's separate estate beyond the time of one year, unless assented to in writing by the husband, or unless he joins in the conveyance.

On looking at the will of the wife of the tenant in the present case, it is apparent that he gave his unqualified assent to it, and that she intended by its provisions to dispose of all her property, both real and personal, absolutely for the sole use and benefit of her children, and that this intention was expressed in apt and proper words. The will is therefore a bar to any title of the

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husband as tenant by the curtesy, and the demandant took nothing by his levy.

It is suggested that the assent of the husband to the will of his wife is inoperative as to the demandant because it was in the nature of a voluntary conveyance of his interest in the wife's real estate, and was therefore fraudulent and void as to existing creditors. The answer to this is twofold. In the first place, it does not appear that the assent was given with any intent to defraud creditors, or that the tenant was in an insolvent condition at the time the assent was signed. *Lerow* v. *Wilmarth*, 9 Allen, 382.

In the next place, the power to give such assent is conferred by statute without qualification or restriction. It is not in the nature of a transfer or conveyance of property in which the husband had any present right or interest, or to which his creditors could look for the payment of their debts, but it is only a waiver of any right in the husband to his wife's property after her decease, of which during her life he had no control, and which was expressly exempted by law from liability for his debts. Gen. Sts. *c.* 108, § 1. *Judgment for the tenant.*

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SARAH E. SPAULDING *vs.* ISAAC DAY.

If a married woman purchases personal property with her own means or upon her own credit exclusively, and takes the conveyance to herself, for her own use, the property becomes her separate property, and is not liable for her husband's debts; although in making the conveyance there is no express statement, in writing or otherwise, that it is to be held as her separate property.

TORT for the conversion of four cords of wood, seized by the defendant, who was a constable, on an execution against the plaintiff's husband, Charles H. Spaulding.

At the trial in the superior court, before *Ames*, J., it appeared that the plaintiff and her husband were married as early as 1850 and have lived together ever since; and that after the death of her father in 1861 she became the sole owner of the homestead

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on which she and her husband lived. The plaintiff testified that in December 1863, upon her request, Peter Prescott brought to her house seven cords of wood, the agreed price of which was thirty-six dollars, of which she paid eleven dollars in money, which was a part of a larger sum which she had borrowed of her mother-in-law, and gave her note for the residue, which was yet unpaid; and that when the defendant came to take the wood she told him it was hers, and forbade him to remove it. No attempt was made to show that the plaintiff had any trade or business separate from her husband, or that she furnished at her own expense or on her own credit any other provisions or supplies for the family.

Upon the above evidence, the judge ruled that the plaintiff was not entitled to recover, and directed a verdict for the defendant. The plaintiff alleged exceptions.

*J. C. Kimball*, for the plaintiff.

*T. Wentworth*, for the defendant, cited *Woodcock* v. *Reed*, 5 Allen, 207; *Commonwealth* v. *Williams*, 7 Gray, 337; *Commonwealth* v. *Davis*, 9 Cush. 283.

Hoar, J. By Gen. Sts. *c.* 108, § 1, it is provided that "the property both real and personal which any married woman now owns as her sole and separate property, that which comes to her by descent, devise, bequest, gift or grant, that which she acquires by her trade, business, labor or services," &c., "shall, notwithstanding her marriage, be and remain her sole and separate property, and may be used, collected and invested by her in her own name, and shall not be subject to the interference or control of her husband, or liable for his debts."

The wood which is the subject of this suit was purchased by the plaintiff, and paid for by her in part with money which she borrowed from her mother-in-law, and with her own promissory note for the remainder. The defendant attached it as the property of the plaintiff's husband. When she bought the wood, she was living with her husband upon a homestead which was her own sole and separate property, acquired partly by descent from her father in 1861, and partly by purchase in the same year with money which came to her in like manner.



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The wood is "personal property," and it came to the plaintiff by "grant." "Gifts or grants," says Blackstone, "which are a method of transferring personal property, are thus to be distinguished from each other, that gifts are always gratuitous; grants are upon some consideration or equivalent." "Grants or gifts of chattels personal are the act of transferring the right and possession of them, whereby one man renounces, and another man immediately acquires, all title and interest therein." 2 Bl. Com. 440, 441. The husband did not interfere with or direct the purchase of the wood, nor did he contribute anything to the consideration paid. The word "grant" was added in the General Statutes to the enumeration of the methods by which a married woman might acquire property to her separate use, given by the statute of 1857. In *Stewart* v. *Jenkins*, 6 Allen, 300, this court decided that a promissory note given by a married woman in payment for land conveyed to her, to her sole and separate use, is valid and binding upon her, under Gen. Sts. *c.* 108, § 3, which authorize her to enter into any contracts in reference to her separate real and personal property. In *Chapman* v. *Foster*, 6 Allen, 136, it was held that a married woman is liable upon a promissory note given by her for money borrowed to pay for land, upon which she carries on the business of farming, and for which she holds a bond for a deed to her sole and separate use. In *Stewart* v. *Jenkins* the general policy and purposes of the statutes, which have changed materially the rights of married women at the common law in respect to acquiring and holding property, are so fully considered and stated that it is not necessary to restate them.

We are of opinion that if a married woman purchases property with her own means or upon her own credit exclusively, and takes the conveyance to herself, for her own use, the property so purchased becomes her separate property, and is not liable for her husband's debts. However it may be in a conveyance of real estate, which is made by deed, and where the purpose that the grantee shall take the estate conveyed to her separate use can be distinctly expressed, if it is intended, the conveyance of personal property to a married woman does not

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require an express statement that it is to be held as her separate estate. It may be made without writing, perhaps even without uttered words. It is therefore a question of fact, from whom the consideration proceeds, and whether the purchase is actually meant as a purchase on her own behalf exclusively. And we think the facts reported in the bill of exceptions had such a tendency to establish such an acquisition of the wood by the plaintiff that they should have been submitted to the jury, and did not justify the direction of a verdict for the defendant given by the court. *Exceptions sustained.*

After the foregoing decision, a new trial was had in the superior court, before *Ames*, J., at which it appeared affirmatively that the plaintiff had no separate trade or business and no income from any source, and that the provisions and supplies for the family were furnished by her husband. She owned, in addition to the homestead, an undivided interest, worth about twenty-five dollars, in a lot of land, and there was no evidence that she had any other separate property. She testified that in February 1864 she borrowed of her mother-in-law two hundred dollars, for which she gave a note signed by herself and her husband, secured by a mortgage upon the house, which was executed by herself and him; and he afterwards paid the interest on the note. The wood in controversy was purchased for fuel to be used in the family. The other facts were the same as at the former trial. The defendant contended that the plaintiff had no legal capacity to contract for the purchase of the wood, and that it was not sold to her for her separate or exclusive use, in such a sense as to become her property; and asked the court to rule that as a matter of law she was not entitled to recover. But the judge refused so to rule, and submitted it to the jury to determine whether she purchased the wood with her own funds and on her own credit, and whether it belonged to her at the time of the attachment by the defendant.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions, which were argued at January term 1866.

*L. E. Shepard*, for the defendant.

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*J. C. Kimball*, for the plaintiff.

Hoar, J. The ruling of the court to which exceptions are taken were precisely in conformity with the decision under which the case was sent to a new trial; and the question submitted to the jury was precisely that which this court had said should be submitted to them. The only material particular in which the evidence now reported differs from that upon which our former decision was made is, that it now appears that when she borrowed the money of her mother-in-law she gave a note signed by herself and her husband, and that he afterward paid the interest on the note. But if she borrowed the money on her own account and for her own separate use, it would make no difference that her husband also gave the security of his name, or that he has executed in part the contract into which he entered. *Parker* v. *Kane*, 4 Allen, 346. *Bartlett* v. *Bartlett*, Ib. 440. *Basford* v. *Pearson*, 7 Allen, 504. Whether she did so was left as a question of fact to the jury, and is settled by the verdict. *Exceptions overruled.*

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Dudley C. Hall *vs.* County Commissioners of Middlesex.

Bonds issued under special legislative authority, by a state or city, for aiding in the construction of railroads, are public stocks, and taxable as such, under Gen. Sts. *c.* 11, § 4.

Assessors of taxes are not bound by a list of property brought in for assessment and sworn to, if it appears from an examination of the person who brings it in that it is not true.

Petition for a writ of *certiorari*, to quash the proceedings of the defendants in refusing to abate a tax assessed upon the petitioner by the assessors of Medford.

It appeared that the excess complained of was a tax assessed upon certain bonds of this commonwealth, to the amount of $9600, and of the city of Albany, to the amount of $17,000. The petitioner carried in to the assessors and made oath to a list of his property which did not include the above bonds, which were then owned by him. The bonds of this commonwealth expressed that the sums therein mentioned were due from the Commonwealth to the holders thereof; and the bonds of the city

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of Albany were expressed in the form of a promise to pay the bearer the sums therein mentioned.

The grounds relied on by the petitioner were, 1st, that the list of his property was conclusive, and 2dly, that the bonds were not public securities, but debts due to him, within the meaning of Gen. Sts. *c.* 11, § 4, and that he was therefore entitled to deduct from them the amount which he owed and paid interest for; and the case was reserved by *Gray*, J., for the determination of the whole court.

*T. S. Harlow*, for the petitioner. The list was conclusive. Gen. Sts. *c.* 11, §§ 22–25. *Newburyport* v. *County Commissioners*, 12 Met. 211, 222, 223. *Winnisimmet Company* v. *Assessors of Chelsea*, 6 Cush. 480. *Lincoln* v. *Worcester*, 8 Cush. 55, 64. *Hardy* v. *Yarmouth*, 6 Allen, 284. The bonds were debts due to the petitioner.

*E. C. Baker*, for the respondents.

METCALF, J. By the Gen. Sts. *c.* 11, § 4, "personal estate shall, for the purposes of taxation, include" (among other things) "money at interest, and other debts due the persons to be taxed more than they are indebted or pay interest for, public stocks and securities, stocks in turnpikes, bridges, and moneyed corporations." But stocks and securities are not that kind of personal estate which, by § 14, when "mortgaged or pledged shall, for the purposes of taxation, be deemed the property of the party who has the possession." *Waltham Bank* v. *Waltham*, 10 Met. 334. If therefore the bonds for which the petitioner has been taxed are public stocks or securities, he was rightly taxed therefor, although they were pledged to a savings bank as collateral security for a debt due from him to the bank.

The ground taken by the petitioner is, that these bonds are not public stocks or securities, but are debts due to him, for which he is exempted from taxation, except for so much thereof as exceeds the amount for which he is indebted or for which he pays interest. But as the statute enumerates debts due to the tax-payer, and stocks and securities, as distinct and separate subjects of taxation, the latter are not to be included in the former.

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Since the legislature has not defined public stocks and securities the court must ascertain, as they best can, what are such, as cases which raise the question are brought before them for decision.

Both classes of bonds owned by the petitioner were executed and issued by legislative authority, and for a kindred purpose. Those of the Commonwealth were issued under *St.* 1839, *c.* 70, entitled "an act to aid the construction of the Western Railroad," which act authorized the issuing of certificates of debt, in the name of the Commonwealth, for a sum not exceeding one million two hundred thousand dollars, redeemable in London at the end of thirty years from the date thereof, and which should "be deemed a pledge of the faith and credit of the Commonwealth for the redemption thereof." The bonds of the city of Albany purport to have been authorized "by the acts of the legislature of New York." And there are three acts of that legislature, "to authorize the corporation of the city of Albany to borrow money for the purposes therein mentioned;" one passed on the 11th of May 1837, another on the 4th of May 1839, and the third on the 26th of May 1841. Each of these acts authorized the mayor, aldermen and commonalty of the city to borrow, on the faith and credit of the city, and to execute bonds therefor to be invested in the stock of the Albany and West Stockbridge Railroad Company, its buildings and appurtenances, and "employed and used in the construction of the said road, its buildings and appurtenances, and for no other purposes whatever." The act of 1839 authorized the city to borrow for the above mentioned purposes four hundred thousand dollars, and the act of 1841, three hundred and fifty thousand dollars, and to execute bonds therefor payable in forty years. And the bonds which were made under the authority of these acts, like those issued by the Commonwealth of Massachusetts, provided for half-yearly interest thereon. And it is well known that the Albany and West Stockbridge Railroad was constructed as an adjunct to the Western Railroad, extending from the line of this state to Albany.

From these facts it appears that the bonds of this commonwealth and those of the city of Albany, which the petitioner

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owns, were issued under legislative sanction in furtherance of great works which both legislatures deemed promotive of the interests of the public. We therefore are of opinion that the bonds are "public stocks or securities," and were rightly taxed as such. On their face they are denominated stock: those issued by the Commonwealth, "Five per cent. stock of the state of Massachusetts;" and those of the city of Albany, "Albany city stock."

The petitioner carried in to the assessors, and made oath to, a list of his property not exempted from taxation, which list did not contain the bonds in question, and he did not refuse to answer on oath, but did so answer, "all questions put to him by the assessors in relation thereto." And he now contends that his list was conclusive on the assessors as to the amount of personal property for which he was liable to be taxed, inasmuch as the Gen. Sts. *c.* 11, § 25, provide that assessors "shall receive as true the list brought in by each individual, unless on being required by them he refuses to answer on oath all necessary inquiries as to the nature and amount of his property;" as if the list first sworn to by the party must be taken as true, though by his own sworn answers to assessors' inquiries he shows that is not a true list. This is an irrational construction of the statute provision, and if adopted would render nugatory all inquiries by assessors. The manifest purpose for which their inquiries are authorized is to correct the list brought in, or to disregard it, if it appears, from an examination of the party, that he, from a mistaken view of the law, oversight, or otherwise, has not sworn to a true list of all his taxable property. *Petition dismissed*

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## Horace T. Hildreth *vs.* James O'Brien.

A bill of parcels of goods, acknowledging the receipt of payment by note, is not conclusive evidence of the contract; but parol evidence is competent to show that the sale was conditional, and that the title was to remain in the vendor until a note signed by responsible persons should be furnished to him.

Replevin of a horse. The answer denied the plaintiff's ownership.

At the trial in the superior court, it appeared that the plaintiff delivered to the defendant a horse, with a written bill of sale as follows: "Natick, April 4, 1863. Sold to James O'Brien one chestnut stud colt for $145. Rec'd payment by note on three months, payable at Hopkinton Bank. H. T. Hildreth." The plaintiff then introduced evidence, under objection, tending to show that the sale and delivery were conditional, with an express stipulation that the horse was not to become the defendant's property until he should deliver to the plaintiff in payment a promissory note which would be discounted at the Hopkinton Bank without the plaintiff's indorsement; and that the defendant never delivered such a note.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

*C. R. Train*, for the defendant.

*J. W. Bacon*, for the plaintiff.

Hoar, J. This case falls exactly within the decision in *Hazard* v. *Loring*, 10 Cush. 267. The evidence offered did not contradict the writing in any particular except the receipt. Every sale, not upon credit, is conditional upon the receipt of the consideration agreed. Everything which the written bill imports was true, except that the note received in payment was not such a note as the defendant had agreed to give. He had bought the horse for the price named, but had not paid for him according to his contract. A receipt is always open to explanation. It is not a contract, but merely evidence of the performance of a contract. *Exceptions overruled.*

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## Betsey W. Heywood *vs.* Esther Heywood.

In an action against an administrator to recover for money had and received by his intestate, evidence is competent of the declarations of the intestate and of the defendant respecting the same; but evidence is not competent of the declarations of the plaintiff to the defendant, of matters which the defendant did not admit, but concerning which he declared his ignorance.

Contract brought against the administratrix of the estate of Benjamin Heywood, for money had and received by him.

At the trial in the superior court, before *Ames*, J., it appeared that the plaintiff, being the owner of a bond of the Cheshire Railroad Company for $500, payable on the 1st of July 1860, lived with the intestate, who was her brother, for about a year and a half before his death, which occurred in June 1862; and that early in June 1860 Benjamin Heywood deposited a bond similar to that of the plaintiff in a savings bank for collection, and the amount thereof, when paid, was put to his credit, and a deposit book was issued to him in his own name. Charles Hovey, a witness for the plaintiff, testified that twice within two years before July 1860 he collected for Benjamin Heywood coupons of fifteen dollars each for semi-annual interest, of the Cheshire Railroad Company; and he was allowed, under objection, to add that Benjamin Heywood said it was for a female friend; and that he consulted the witness whether he had better collect the money when it became due, or take a new bond, and also that the defendant, since her appointment as administratrix, had made certain declarations to him, which were not recited in the bill of exceptions.

Elbridge Dutton, another witness for the plaintiff, was allowed, under objection, to give an account of a conversation between the plaintiff and the defendant, after the latter's appointment, in which the plaintiff called for her own books and papers, and the defendant gave up some papers, including a deposit book for another savings bank, and the plaintiff said, "There is another bank book, which you have not brought forward," to which the defendant replied that she knew of no other, except her son's;

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and that the plaintiff said to the defendant, about a fortnight after, "Won't you show me the book you have had appraised as Ben's property, the money that came from the Cheshire Railroad bond that run out in 1860? Ben collected the money and deposited it in the savings bank;" to which the defendant replied, "I know nothing about my husband's business."

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

*A. R. Brown*, for the defendant.

*G. Stevens*, for the plaintiff.

GRAY, J. The testimony of Hovey to admissions of the intestate in his lifetime, and of his administratrix since her appointment, was competent evidence in this action against her for money had and received by him.

But as it does not appear that the defendant introduced any evidence that the plaintiff had done any act tending to show that she did not claim the bank book in question, the plaintiff's statements to the administratrix, the truth of which the latter did not admit by assent or silence, but declared her total ignorance about, were inadmissible in the plaintiff's favor.

*Exceptions sustained.*

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## PATRICK GANNON *vs.* JOHN HARGADON.

**The owner of land may lawfully occupy and improve it in such manner as either to prevent surface water which accumulates elsewhere from coming upon it, or altering the course of surface water which has accumulated thereon or come upon it from elsewhere; although the water is thereby made to flow upon the adjoining land of another, to his loss.**

TORT to recover damages for turning a stream of water so that it flowed upon the plaintiff's close in West Newton.

At the trial in the superior court, before *Brigham*, J., the evidence tended to show that the defendant owned a lot of land lying to the west of the plaintiff's; that along the easterly line of the defendant's lot there was a way, which extended further to the north; that on the west side of the way, and north of the

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defendant's lot, a ditch was dug in 1863 which extended down to within a few feet of the defendant's lot; that a few feet be low the northerly line of the defendant's lot there was a low place in the way, below which deep ruts had been made; that in March 1863 the melting of the snow and the spring rains caused a considerable flow of surface water from the land to the north of the defendant's lot, through the ditch, and over the way and through the ruts upon the defendant's lot; and that the defendant thereupon placed turfs in the ruts just below the low place in the way, and upon his own land, for the purpose of protecting the way from injury, and thereby caused the water to flow off upon the plaintiff's land.

The defendant asked the court to instruct the jury as follows: "If the defendant placed sods in the cart ruts upon the way over his own land from time to time as the ruts were made by the passing of the cart, and he did this merely to prevent the water from making channels of such ruts, and gullying, washing away and injuring said way and the land of the defendant, and such water was not that of a watercourse but merely surface water caused by the melting of snows and the fall of rains in the spring, and flowed on to the defendant's land from land above his own, and if in consequence of the placing of said sods the said water which would otherwise have run down said ruts was diverted upon the plaintiff's land, the defendant is not liable therefor. The plaintiff had no right that the ruts made on the defendant's land should be kept open."

The judge declined so to rule, and instructed the jury as follows: "The plaintiff and defendant, being conterminous proprietors, had each the right to develop, improve and enjoy his own estate; and if, as an incident to the exercise of this right, the estate of the other was injured, he would have no legal remedy for such injury. Each, on his own estate, might do acts to prevent the other's exercise of this right from being injurious to him; and if in so doing the other's development, improvement and enjoyment of his estate was restricted, for such restrictions, if injurious, he would have no legal remedy. But neither would have the right to transfer or divert a cause of injury to

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him, arising from the exercise of the right stated, by the other to another conterminous proprietor.

"To apply these principles to the present case. The defend ant, for the purpose of repairing and enjoying the way over his estate, had a right to exclude surface water from his estate and from his way, which flowed from conterminous estates; and if as an incident to the exercise of this right such surface water flowed upon the plaintiff's land, the plaintiff has no remedy against the defendant; if the defendant failed to exercise this right, and the consequence of this failure was that water flowed from estates conterminous to that of the defendant upon the defendant's land, and thence upon the plaintiff's land, to his injury, he would have no remedy against the defendant; but if surface water flowing from land conterminous with the land of the defendant upon the defendant's land, which water in its natural course would not have flowed upon the plaintiff's land, was by the act of the defendant diverted thence upon the plaintiff's land to his injury, the plaintiff would have a remedy against the defendant for such injury, notwithstanding the act of diverting such surface water by the defendant was an act of repair of his way, and was for the purpose of preventing said way from being injured by such surface water."

The judge further instructed the jury that "the defendant could have prevented the water from coming upon his own land, and if in doing so he had diverted the water upon the land of the plaintiff, he would not be liable for so doing; but if the defendant suffered the water to flow in upon his land, then the case was different, and having once suffered the water to come upon his land, if he diverted it upon the land of the plaintiff, to his injury, where it would not have gone in its natural course, he was liable; and if the turfs placed in the ruts by the defendant caused water thus to flow upon the plaintiff's land which but for said turfs would not have gone there, then the defendant is liable."

The jury returned a verdict for the plaintiff, and the defendan alleged exceptions.

*D. E. Ware*, for the defendant.

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*J. Rutter*, for the plaintiff.

Bigelow, C. J. It seems to us that the instructions for which the defendant asked should have been given, and that those under which the case was submitted to the jury were not in accordance with the principles recognized and adopted in cases recently adjudicated by this court. The right of an owner of land to occupy and improve it in such manner and for such purposes as he may see fit, either by changing the surface or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated with reference to that of adjoining owners that an alteration in the mode of its improvement or occupation in any portion of it will cause water, which may accumulate thereon by rains and snows falling on its surface or flowing on to it over the surface of adjacent lots, either to stand in unusual quantities on other adjacent lands, or pass into and over the same in greater quantities or in other directions than they were accustomed to flow. *Luther* v. *Winnisimmet Co.* 9 Cush. 171. *Flagg* v. *Worcester*, 13 Gray, 601 *Dickinson* v. *Worcester*, 7 Allen, 19. The point of these decisions is, that where there is no watercourse by grant or prescription, and no stipulation exists between conterminous proprietors of land concerning the mode in which their respective parcels shall be occupied and improved, no right to regulate or control the surface drainage of water can be asserted by the owner of one lot over that of his neighbor. *Cujus est solum, ejus est usque ad cœlum* is a general rule, applicable to the use and enjoyment of real property, and the right of a party to the free and unfettered control of his own land above, upon and beneath the surface cannot be interfered with or restrained by any considerations of injury to others which may be occasioned by the flow of mere surface water in consequence of the lawful appropriation of land by its owner to a particular use or mode of enjoyment. Nor is it at all material, in the application of this principle of law, whether a party obstructs or changes the direction and flow of surface water by preventing it from coming within the limits of his land, or by erecting barriers or changing the level of the soil, so as to turn it off in a new course after it has

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come within his boundaries. The obstruction of surface water or an alteration in the flow of it affords no cause of action in behalf of a person who may suffer loss or detriment therefrom against one who does no act inconsistent with the due exercise of dominion over his own soil. This principle seems to have been lost sight of in the instructions given to the jury. While the right of the owner of land to improve it and to change its surface so as to exclude surface water from it is fully recognized, even although such exclusion may cause the water to flow on to a neighbor's land, it seems to be assumed that he would be liable in damages, if, after suffering the water to come on his land, he obstructed it and caused it to flow in a new direction on land of a conterminous proprietor where it had not previously been accustomed to flow. But we know of no such distinction. A party may improve any portion of his land, although he may thereby cause the surface water flowing thereon, whencesoever it may come, to pass off in a different direction and in larger quantities than previously. If such an act causes damages to adjacent land, it is *damnum absque injuria*. On this point the instructions were clearly erroneous.

*Exceptions sustained.*

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## Citizens' Mutual Fire Insurance Company *vs.* Daniel R. Sortwell & others.

If the by-laws of a mutual insurance company do not provide that the deposit notes shall be deemed to be absolute funds of the company, but speak of assessments thereon, such assessments may be laid and collected in the usual manner.

If a committee of the directors of a mutual insurance company have made a report recommending an assessment upon the deposit notes, and stating the amount and all the details, a vote of the directors to accept and adopt the report is sufficient to authorize the laying of the assessment.

Under the Gen. Sts. *c.* 58, § 54, the statement of the condition of a mutual insurance company at the time of laying an assessment may be recorded in the same book in which the annual statements of the company are recorded; and if signed by several of the directors, and it does not appear that any others voted for it, the presumption is that all who voted for it signed it.

If a mutual insurance company have issued policies running for one year, three years and five years, respectively, the premiums for three years being twice the rate charged for one

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year, and those for five years being three times the rate charged for one year, and, in computing the amount to be assessed for each month's losses, a basis is found by taking the whole of the premium for each one year policy, one third of that for each three years policy, and one fifth of that for each five years policy, and this method is found by the superior court, in an action to recover an assessment, to be just and equitable, this court will not, upon a hearing on exceptions, declare the assessment void, as being unequal.

CONTRACT brought by a mutual insurance company, to recover an assessment upon a deposit note executed to them by the defendants.

At the second trial in the superior court, before *Putnam*, J., without a jury, after the decision reported in 8 Allen, 217, it appeared that the assessment was based upon a computation of losses from month to month, making rests at the end of each month, and computing the entire monthly losses and expenses. The company issued policies for one year, three years and five years, respectively, the premiums for three years being twice the rate charged for one year, and those for five years being three times the rate charged for one year. The basis of assessments was found anew for each month, by taking the whole of the premium for each one year policy, one third of that for each three years policy, and one fifth of that for each five years policy.

Certain other facts are sufficiently stated in the opinion. Upon the whole evidence, the judge, being of opinion that the method of laying the assessment was just and equitable, that the plaintiffs had complied with the provisions of law, and that the assessment was legal, ordered judgment to be entered for the plaintiffs. The defendants alleged exceptions.

*J. S. Holmes & C. S. Lincoln*, for the defendants.

*W. W. Warren & H. Baldwin*, for the plaintiffs.

CHAPMAN, J.* 1. The by-laws of the company do not make the deposit notes absolute funds. They are not declared to be such, but, on the contrary, assessments of these notes are spoken of in the 23d article. The court are of opinion that it was proper to assess them in the usual way.

2. The record of the assessment was sufficient. The directors

* HOAR, J. did not sit in this case.

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voted to cancel all their second class policies, and close the business of that class. This would of course make a return of a portion of the premium which had been paid on unexpired policies due to the holders of such policies; and, if there were not funds in the hands of the company sufficient to pay the debt thus created, it would be proper to raise the money by assessment upon the policy holders from whom it was due. But this is not important in the present case, as the defendants were not assessed for any part of this debt. The company also owed other debts, and a committee of the directors which had been appointed to consider the matter made a report recommending an assessment, and stating its amount and all its details. It is objected that, though it was voted that the report be accepted and adopted, yet this was not a sufficient vote to authorize the assessment. But no particular formula is necessary in voting an assessment. Corporate votes are sufficient if they state substantially and intelligibly the intent of the voters. Thus, the vote of a town accepting the report of a committee appointed to establish school districts, and recommitting it to the committee for the purpose of having the work completed, is sufficient to establish the districts, though the town does not in direct terms express its intent to establish them. *Alden* v. *Rounseville*, 7 Met. 218. In this case the vote to accept and adopt the report, which not only recommended the assessment but stated its details, expresses with sufficient clearness the intent of the directors to make the assessment in the manner in which the committee had prepared it.

3. The Gen. Sts. *c.* 58, § 54, do not require that the book in which the statement of the assessment is recorded shall be used for that sole purpose. The fact that the same book was used by the secretary of the company to record the annual statements of the company could not injure any one, and was not contrary to the spirit, intent or letter of the statute. The statement of the assessment appears to have been signed by six of the directors; and, as it does not appear that any others voted for it, the presumption is that all who voted for it signed the statement, as it was their duty to do.

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4. The judge who tried the cause was of opinion upon the whole evidence that the method of laying the assessment which was adopted was just and equitable. His opinion on this point should be our guide, unless we can see that the method was in violation of some principle. But on examination we can see no such violation of principle. Exact equality cannot be obtained, and it is sufficient if the assessment makes a reasonable approximation to equality *Exceptions overruled*

SETH DAVIS *vs.* QUINCY MUTUAL FIRE INSURANCE COMPANY

An omission to disclose, in an application for insurance on a building, a written agreement by the applicant to convey it in consideration of a certain sum of money to be paid within a fixed time, or to disclose the fact that the greater part of the money orally agreed upon as the consideration for the conveyance was paid before the written agreement was entered into, will not avoid or prevent the recovery of the full amount insured by a policy of insurance which provides that it is issued on condition that the application contains a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property.

A policy of insurance upon the interest of a "mortgagee in possession," in a building "occupied by a tenant," is valid, although another person was in the occupation of the premises under an agreement from the assured to convey the same to him.

A mortgagee of a building whose interest therein is insured by a policy which provides that, in case of payment of any loss to him, he shall assign to the company so much of his interest in the mortgage as may not be necessary to extinguish the residue of the debt due thereon, may recover the full amount insured, although before the date of the policy he had entered into a written agreement to convey the premises insured to a person who, by the terms of the same agreement, was to be at the expense and to have the benefit of the insurance, and who, after the date of the policy and before the loss, had recognized the policy by paying the expense thereof.

CONTRACT upon a policy of insurance for $1000, dated December 3, 1863, issued by the defendants to the plaintiff "on his interest as mortgagee in possession" in a dwelling-house "occupied by a tenant" and situated in Chelmsford. The policy contained the following provisions: "This policy is made and accepted upon the following express conditions, viz: that the application for this insurance contains a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property, so far as the same



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are known to the insured and are material to the risk." "And if the title to the property, or any part thereof, shall be alienated, ..... this policy shall be void." "In case of payment of any loss to a mortgagee whose interest only is insured, the party so paid shall, at the time of payment, assign to the company so much of his interest in the mortgage as may not be necessary to extinguish the balance of the debt due thereon." In the application, the plaintiff requested insurance "on his interest as mortgagee in possession in a two story wooden house and shed attached, and formerly occupied by Levi S. Fales and now by another tenant."

It was agreed in this court that on the 18th of April 1860 Levi S. Fales, being the owner of the premises, executed two mortgages thereof to D. Wheeler, one of which was given to secure five notes, amounting together to $2750, and the other to secure a note for $1250. On the 4th of June 1860 Wheeler assigned to the plaintiff the note for $1250 and the mortgage given to secure the same; and also the other mortgage "to the extent of $1500, being the amount specified in three promissory notes named in said mortgage." Davis duly entered upon the premises for breach of the condition of both mortgages, and while he was so in possession, on the 22d of October 1863, Susan H. Fales, wife of said Levi S., made a bargain with him to purchase for $1550 all his interest in the premises, and paid him $1400, and took from him an agreement under seal, dated that day, the material portions of which are as follows:

"Know all men by these presents that I, Seth Davis, ..... in consideration of one hundred and fifty dollars to be paid in twelve months by Susan H. Fales, wife of Levi S. Fales, ..... do hereby promise and agree, whenever the aforesaid Susan may so request, to give her a quitclaim deed of the house and land known by the name of the Marshall place, situated in Chelmsford as aforesaid, and all my right and interest in said estate, acquired by the act of heretofore making an entry upon the same for the purpose of foreclosing two certain mortgages on said premises, dated April 18, 1860, signed by the aforesaid Levi S. Fales, to secure the payments of four certain notes, as set

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forth in said mortgages, signed by the aforesaid Fales, the aggregate amount of said notes being $2750. And I hereby agree that the said Susan may enter in and upon said premises forthwith, and have all the benefit arising from the occupancy of said premises that I, the said Davis, now or may have by virtue of the entries upon said premises for the purposes as heretofore set forth, and likewise the benefit of the insurance on the buildings on said premises, she the said Susan to be at the expense for the insurance on the same. And the said Susan hereafter is to have all the present and future benefits of the aforesaid estate that I, the said Davis, could have by and in consequence of the entry upon said estate for the purposes as heretofore set forth, without any further consideration beyond the aforesaid sum of $150, which sum when paid is to cancel all demands against the said Susan for all demands for the occupancy and use of said premises, as also a certain note, dated October 20, 1863, signed by the aforesaid Levi S. Fales and the said Susan H. Fales, whereby, for value received, they promise to pay to the said Seth Davis, or order, the sum of $150, in one year." "Provided, however, said request is to be made within three years from the date of this instrument."

The said Susan has since occupied the house, but has never paid the $150 mentioned in the agreement; and the plaintiff has made no transfer of his interest in the premises. On the 1st of April 1864 Susan paid to him the expense of the insurance; and on the 20th of May following the premises were consumed by fire, and were of greater value than the amount insured. No part of the notes secured by the mortgages has ever been paid. The above agreement was not disclosed to the defendants until after the fire.

It was admitted that the plaintiff is entitled to recover, unless prevented by his transactions with Mrs. Fales, or his omission to disclose the agreement with her to the defendants; and, if entitled to recover, it was agreed that he was entitled to recover $1000 and interest, unless upon the facts the defendants should be held liable for only $150 and interest. Upon these facts, the case was reserved for the determination of the whole court.

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*D. S. Richardson & G. F. Richardson*, for the plaintiff, cited *Nichols* v. *Fayette Ins. Co.* 1 Allen, 63; *Strong* v. *Manuf. Ins. Co.* 10 Pick. 40; *King* v. *State Ins. Co.* 7 Cush. 7; *Masters* v. *Madison County Ins. Co.* 11 Barb. 624; *Kernochan* v. *New York Ins. Co.* 17 N. Y. 428; *Ins. Co.* v. *Updegraff*, 21 Penn. State R. 513.

*W. S. Morton*, for the defendants. The application did not contain a full exposition of the material facts. The plaintiff's real interest was only $150. *Davenport* v. *New England Ins. Co.* 6 Cush. 340. *Brown* v. *People's Ins. Co.* 11 Cush. 280. *Bowditch Ins. Co.* v. *Winslow*, 3 Gray, 415. *Jenkins* v. *Quincy Ins. Co.* 7 Gray, 370. The plaintiff by his agreement had rendered himself unable to comply with the provision of the policy that he should assign to them a portion of his interest. He had also parted with the possession of the premises, and his statement that he was in possession was incorrect. At any rate, as the plaintiff's interest was only to the extent of $150, the damages should be only for that sum.

CHAPMAN, J. It is agreed that the only obstacle to the plaintiff's right to recover is his agreement with Susan H. Fales.

His application for insurance was "on his interest as mortgagee in possession," and describes the property as occupied by a tenant. The policy is on the same interest, and describes the property in the same way; so that the phrase "mortgagee in possession" was not understood by the parties to imply an occupancy by the plaintiff, and the mere occupancy of Mrs. Fales is not a material fact.

The plaintiff's agreement with her was made prior to the date of the policy, and related to the same interest which was insured by the policy. In April 1860 Levi S. Fales had made two mortgages to D. Wheeler, one of which was to secure a note of $1250, and the other to secure several notes, amounting in all to $2750. In June 1860 Wheeler sold the first note and mortgage to the plaintiff. He also sold to him three of the other notes, amounting to $1500, and assigned to him a corresponding interest in the mortgage that secured them. Before the agreement was made with Mrs. Fales, the plaintiff had taker

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possession for foreclosure under both mortgages. As part of the consideration for the agreement with her, she paid the plaintiff $1400 in cash, but this is not mentioned in the agreement. The terms of the agreement were, that in consideration of $150 to be paid by her in twelve months he would quitclaim to her his interest in the mortgages; that she might enter upon and occupy the premises and have the benefit of his entry; that she should have the benefit of the insurance on the buildings, she paying the expense of the insurance; and that he would quitclaim the land to her at any time within three years, she first paying the $150 and making request. As there was no agreement on her part, it was left at her option whether or not she would pay the money and take the conveyance. The contract was thus left executory, and until she paid or tendered the money she had no title, either legal or equitable, but only a right to acquire a title by making the payment. She entered and occupied as a mere tenant who had paid $1400, and had a right to occupy for a limited time, but no further present right in the property. This cannot be regarded as an alienation by the assured, within the terms of the policy.

Before the loss, she had paid to the plaintiff the expense of the insurance, but this cannot be regarded as effecting an assignment of the policy.

The most important question that arises in the case is under the clause in the policy which provides that, "in case of payment of any loss to a mortgagee whose interest only is insured, the party so paid shall, at the time of payment, assign to the company so much of his interest in the mortgage as may not be necessary to extinguish the balance of the debt due thereon." If by the agreement with Mrs. Fales the plaintiff had disabled himself from making such assignment to the company, without violating that agreement, it might perhaps bar his right to recover. But the agreement expressly recognizes his right to insure, and it is implied that the insurance may be on reasonable terms and conditions. The condition above stated is reasonable, it being the clause which has the effect to limit the insurance to his interest as mortgagee, and to prevent him from

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recovering not only the whole insurance in case of loss, but also the whole of his debt in addition. An assignment to the company according to this clause, on receipt of the money, would not therefore be a violation of the agreement with Mrs. Fales. In addition to this, it may be remarked that she has expressly recognized this policy as being within the terms of the agreement by paying the expense of it. It thus appears that the interest of the defendants is not affected by the agreement, and the plaintiff is entitled to judgment for $1000.

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ABEL H. MERRIAM *vs.* CYNTHIA WILLIS & others.

A mere occupant of land cannot maintain an action against the true owner for a trespass thereon; and therefore in such action evidence of matters in aggravation is incompetent.

TORT in the nature of trespass *quare clausum fregit*. At the trial in the superior court, before *Brigham*, J., a verdict was returned for the defendants, and the plaintiff alleged exceptions. The case is sufficiently stated in the opinion.

*E. Pearson*, for the plaintiff.

*T. H. Sweetser & W. S. Gardner*, for the defendants, were not called upon.

METCALF, J. This bill of exceptions shows that the plaintiff failed to prove a right to maintain, against these defendants, this action for breaking and entering his close. The evidence showed that the sole title to the close was in Cynthia Willis, and there was no evidence of the plaintiff's right to any possession thereof. Whatever right or title thereto the plaintiff may once have had, he quitclaimed it to her in October 1849, and she conveyed it to Brastow in 1852, and took back a mortgage from him, which she foreclosed in October 1857. And though the plaintiff continued in possession from 1849 until he was removed by her orders, after she had foreclosed the mortgage, yet the terms on which he had possession, for any part of that time, do no.

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appear. He showed no demise, written or oral, from Mrs. Willis or from her mortgagor, nor any pretence of a right or title against her. The bond, which he offered in evidence, was given by her to John G. Rogers, in October 1849, (on the next day after she received the plaintiff's quitclaim,) conditioned that she would make certain dispositions of the close in question for his advantage. But Rogers thereby acquired no title, possessory or other, and his consent that the plaintiff might occupy the close had no effect on the rights of Mrs. Willis. As against her and those acting for her by her direction, the close was not the plaintiff's, and he therefore cannot maintain this action, though he might maintain such action, on his mere possession, against an intruder having no better title. 1 Chit. Pl. (6th Amer. ed.) 204. *Burling* v. *Read*, 11 Ad. & El. N. R. 904. *Barnstable* v. *Thacher*, 3 Met. 242, 243.

The gist of this action is injury to the possession of real estate, and the alleged trespass on person and personal property is, in law, only aggravation of that injury. Unless the breaking and entering of the close of the plaintiff is proved, the action is not maintainable for the matter of aggravation; but damages therefor are to be sought in a count framed for that single purpose. *Bennett* v. *Allcott*, 2 T. R. 168. *Ropps* v. *Barker*, 4 Pick. 239. *Robbins* v. *Sawyer*, 3 Gray, 376, 377. *Exceptions overruled.*

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DANIEL G. LEAVITT *vs.* CHARLES G. FLETCHER.

A lease for years was executed in duplicate, of a brick stable and a wooden carriage-house. One copy provided that the lessor should make all necessary repairs on the outside of the "building," and the other, upon the outside of the "buildings." The lessee covenanted to deliver up the premises at the end of the term in good order and condition, reasonable use and wearing thereof, fire and other unavoidable casualties excepted, and not to make or suffer any waste thereof, and to make all necessary repairs on the inside of the building. During the term, the carriage-house fell from the weight of snow upon the roof, and injured the lessee's carriages kept therein; and the lessor refused to rebuild it. *Held*, that the lessee might maintain an action for the refusal to rebuild, so as to make the carriage-house outwardly complete, but not for the injury to the carriages.

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Leavitt v. Fletcher.

CONTRACT brought by a lessee against a lessor to recover damages for a breach of the covenant to repair. The material portions of the lease and the agreed facts upon which the case was submitted to the determination of the whole court are stated in the opinion.

*D. S. Richardson & B. J. Williams*, for the plaintiff.

*T. H. Sweetser & W. S. Gardner*, for the defendant.

GRAY, J. By the indenture upon which this action is brought the defendant "does lease, demise and let" to the plaintiff a brick stable standing on the lessor's own land, and a wooden carriage-house standing on land held by him under a lease from others, with a provision that if they shall require the termination of that lease and the removal of the carriage-house, the plaintiff may terminate this lease. The lessor "agrees to make all necessary repairs on the outside of said building." The lessee agrees to pay a certain rent monthly, and to quit and deliver up the premises to the lessor at the end of the term "in as good order and condition, reasonable use and wearing thereof, fire and other unavoidable casualties excepted, as the same now are or may be put into by the said lessor;" not to make or suffer any waste thereof; and "that the lessor may enter to view and make improvements, and to expel the lessee, if he shall fail to pay the rent as aforesaid, or make or suffer any strip or waste thereof. And said lessee is to make all necessary repairs on the inside of the building at his own expense."

The brick stable is the building mentioned in the lease next before the lessor's covenant to make outside repairs; but we have no doubt that this covenant includes all the premises leased by the defendant to the plaintiff, the carriage-house as well as the stable. Indeed in the duplicate indenture in the hands of the defendant the plural word "buildings" is substituted for "building" in this covenant.

The facts agreed by the parties are as follows: The carriage-house was a frame covered with matched boards, had a shingled roof and a plank floor, and on the inside was left uncovered by lath or plaster. While the plaintiff was occupying the premises under the lease, a quantity of snow accumulated upon the roof

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of the carriage-house, until, at the close of a heavy snow storm, the carriage-house fell from the weight of snow, crushing and injuring the plaintiff's carriages kept therein. The plaintiff afterwards demanded of the defendant that he should restore and rebuild the carriage-house, but the defendant refused to do so. There is nothing in the case to show that any negligence of either party contributed to the accident.

For five months succeeding the fall of the carriage-house, the plaintiff paid to the defendant, under protest, the rent reserved in the lease; and then, ceasing to pay rent, was ejected by the defendant. The lessee's covenant to pay rent was not affected by the injury to the premises, nor limited by the exception of unavoidable casualty in his subsequent covenant, and is independent of the lessor's covenant to make outside repairs. *Belfour* v. *Weston*, 1 T. R. 310. *Hare* v. *Groves*, 3 Anstr. 687. *Kramer* v. *Cook*, 7 Gray, 550, and cases cited. And it is not now denied that the lessee was rightly required to pay rent, and lawfully ejected for failing to pay.

The lessee in this action claims damages, 1st. for the injury occasioned by the fall of the carriage-house; 2dly, for the failure of the lessor to rebuild it, after being expressly requested so to do.

It is well settled that in a lease of real estate no covenant is implied that the lessor shall keep the premises in repair or otherwise fit for occupation. *Dutton* v. *Gerrish*, 9 Cush. 89. *Foster* v. *Peyser*, Ib. 242, and cases cited. *Welles* v. *Castles*, 3 Gray, 326. The express covenant of the defendant in this case is only "to make all necessary repairs on the outside of the building." He does not covenant that the outside shall not give way, but that, if it does, he will repair it. He cannot therefore be held liable for the damages occasioned by the fall of the building.

But it has been the established rule of the common law for ages that an express covenant to repair binds the covenantor to make good any injury which human power can remedy, even if caused by storm, flood, fire, inevitable accident, or the act of a stranger. Yearbook 40 Ed. III. 6. Dyer, 33 *a*. *Paradine* v *Jane*, Aleyn, 27; *S. C* Sty'e, 47. *Compton* v. *Allen*, Style, 162

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*Bullock* v. *Dommitt*, 6 T. R. 650. *Green* v. *Eales*, 2 Q. B 225; *S. C.* 1 Gale & Dav. 468. *Phillips* v. *Stevens*, 16 Mass 238. *Bigelow* v. *Collamore*, 5 Cush. 231. *Allen* v. *Culver*, 3 Denio, 294. *Dermott* v. *Jones*, 2 Wallace, 7, 8. The defendant's covenant contains no exception of natural causes or inevitable accident. "The outside of the building" includes the whole outer shell of the building, or external inclosure of roof and sides. *Green* v. *Eales*, above cited. "The necessary repairs on the outside" are those which will make the building outwardly complete. When those are made, then, and not before, the lessee will be bound by his covenant "to make all necessary repairs on the inside." The fact that rebuilding the outside will so far replace the whole building as to leave very little to be done on the inside, and thus make the performance of the lessee's covenant very easy, does not in any degree excuse the lessor from first performing his covenant. The defendant is therefore responsible for the damages suffered by the plaintiff by reason of the defendant's refusal to rebuild, from the time of that refusal until the ejectment of the plaintiff for not paying his rent; and according to the agreement of the parties the case must stand for the assessment of those damages.

*Judgment for the plaintiff accordingly.*

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MARCELLA S. COURTNEY *vs.* LIZZIE G. DOYLE.

If a promissory note does not purport to have been given for value, and long after its delivery and acceptance it is signed by another person as promisor, and the date altered, such new signer cannot be held liable upon it without proof of a new consideration.

CONTRACT upon the following promissory note: "Lowell May 1, 1861. I promise to pay Marcella Sears the sum of three hundred dollars with interest from date. (Signed) Mary A. Doyle, Lizzie G. Doyle." The plaintiff's maiden name was Marcella Sears, and the note was given to her; and in January 1859 she married John Courtney. The action was originally

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brought against both signers of the note, and Mary A. Doyle was defaulted.

At the trial in the superior court, before *Ames*, J., it appeared that the plaintiff lent three hundred dollars to Mary A. Doyle, and took the note declared on, which was then dated as of that time and signed by Mary A. Doyle alone; that the interest was adjusted up to May 1st 1861, at which time the note was intrusted to said Mary, who afterwards returned it with the date altered to that day and the name of Lizzie G. Doyle added to it, signed by herself.

Upon these facts, the judge ruled that the plaintiff was not entitled to recover against Lizzie G. Doyle, and a verdict was taken accordingly; and the case was reported to this court.

*A. R. Brown*, for the plaintiff.

*T. Wentworth*, (*A. F. Jewett* with him,) for the defendant.

Bigelow, C. J. The note did not on its face import a consideration. It was therefore necessary for the plaintiff to prove that it was given for value at the time it was signed by the defendant Lizzie G. Doyle. This the evidence did not show. On the contrary, the note had long previously been given by the other promisor for a consideration passing between her and the plaintiff. No new consideration existed or was received or paid when the defendant Lizzie G. signed the note. The effect of her signature was, that she became a party to a previously existing contract made on a consideration wholly past and executed. There was no new contract and no new or additional consideration, when the defendant Lizzie G. signed the note. Under such circumstances, on familiar and well settled principles, she cannot be held on the promise. As to her, it was without consideration. *Green* v. *Shepherd*, 5 Allen, 389, and cases cited.

*Exceptions overruled.*

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## Belinda Drake *vs.* Charles W. Green.

An executor or administrator may be removed, under Gen. Sts. c. 101, § 2, if he is evidently unsuitable for the discharge of his trust at the time when the petition for his removal is heard, although the same facts which render him unsuitable existed at the time of his appointment.

An executor or administrator will not be removed, as evidently unsuitable for the discharge of his trust, simply on proof that he was unsuitable at the time of his appointment, and without proof that he continues to be so.

Appeal from the decree of the judge of probate, removing the respondent from the office of administrator with the will annexed of the estate of Elizabeth Green.

At the hearing in this court, before *Gray*, J., the following facts appeared: The will was finally established in this court on the 31st of October 1861, making the petitioner and two other persons residuary devisees. On the following day, the respondent obtained from those two residuary devisees deeds of their shares of the estate, for one of which he agreed to pay less than half of the consideration named therein, and these deeds were not recorded till November 1864. William H. Willis, the executor named in the will, brought an action against the respondent to recover the amount of a note and interest, amounting to $503.95. On the 8th of September 1863 he resigned his trust as executor, and on the following day judgment was rendered in that action for the plaintiff, for the sum of $201.67, in accordance with a written agreement of the parties thereto, without date. The account of Willis as executor was duly settled, in which he charged himself with the amount of the note, and credited himself with a bill of the respondent equal to the difference between the amount of the note and of the judgment.

The petitioner also offered evidence that the respondent before his appointment had tried to induce a creditor to enlarge a claim against the estate, and said that "he was determined to put the old lady (the petitioner) through, as long as he was worth a dollar." But as the petitioner offered no evidence that the respondent had done anything since his appointment which made

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him unsuitable for the trust, otherwise than his continued unsuitableness might be inferred from the facts above stated, and as it appeared that the petitioner knew of all the facts relied upon within a month or very little more after his appointment, the judge ruled that her remedy should have been by appeal from the decree of appointment, or petition to this court for leave to appeal therefrom, and ordered the decree of the judge of probate to be reversed, subject to the opinion of the whole court.

*T. H. Sweetser & J. L. Newton*, for the petitioner.

*A. V. Lynde*, for the respondent, cited *Hussey* v. *Coffin*, 1 Allen, 354, and cases there cited; *Richards* v. *Sweetland*, 6 Cush. 324.

Hoar, J. The court are all of opinion that the decision of the justice of this court who reported the case was right, and that the evidence did not show that the administrator had become evidently unsuitable for the discharge of his trust, within the meaning of the statute. Gen. Sts. *c.* 101, § 2.

In so deciding, we do not mean to adopt to its full extent the ground taken by the respondent, that the cause of removal must be in every case an evident unsuitableness arising since the appointment. It must be an existing unsuitableness at the time when the petition for removal is heard. For it is not enough to show that the administrator was unsuitable at the time he was appointed, without showing further that the disqualification has continued, or has been revived. The appointment has been regularly made, and, if not appealed from, is valid and conclusive. All parties in interest were notified according to law, and their remedy, if they were dissatisfied with the appointment, was by appeal. The person appointed, whether suitable to discharge the trust or not, has become the administrator, perhaps because no one took the trouble to prove his unsuitableness. On a petition to remove him, the court does not reconsider the question whether his original appointment was proper. That has been adjudicated. His qualifications when he was appointed may incidentally be introduced in evidence, in order to show what his present qualifications are. But if since his appointment he has not become a suitable administrator, he has become an unsuitable one, and may be removed for that

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cause upon petition, although the present unfitness may have existed before his appointment to an equal degree, and would have been a good cause for refusing to appoint him in the first instance.

Thus, for example, a person who applies for administration may have interests conflicting with those of the estate. The probability that these would prove an embarrassment in the proper performance of his duty might be a sufficient reason for a refusal of the judge of probate to intrust him with the administration. But he is appointed. Either the fact was not brought to the notice of the judge, or he did not think it a sufficient objection. The administrator enters upon the discharge of his trust. It may be that his claims adverse to the estate are amicably adjusted; or he may show by his conduct that he is ready to make his own rights subordinate to those whose interests he represents. It would not then be just or lawful to deprive him of his vested interest in the administration, by merely showing the condition of things before his appointment, and thus in effect rejudging the correctness of the decision which had been made. But suppose on the other hand that his claims remain unsettled, and without reasonable prospect of a fair settlement; or that by act or speech he shows that he intends to secure an unfair advantage to himself; then, within the meaning of the statute, he may be held to have "become evidently unsuitable for the discharge of his trust;" and we think it would be no sufficient answer to an application for his removal, that he was just as unsuitable when he was appointed.

In the case at bar the objections to the administrator are, that before his appointment he had by words and acts manifested a spirit of hostility to the petitioner, a person interested in the estate; and a disposition to obtain undue advantages for himself. But he was appointed, and no appeal was taken from the decree appointing him. There was nothing in the evidence to show that his previous state of feeling and purpose has continued, or has been manifested in any manner since his appointment. There is no legal presumption that he now intends anything inconsistent with his duty. Very slight evidence of the present

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existence of his former disposition might have been sufficient, in connection with the proof of what occurred before his appointment, to justify removing him. But no evidence whatever being introduced, a sufficient cause is not established.

*Decree of the judge of probate reversed.*

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JAMES FARRELLY & wife *vs.* JONATHAN LADD.

*If a married woman delivers her own money to another person to deposit in a savings bank in his own name in trust for her, and this is accordingly done, the trust thereby created is terminated by his death, and she thereupon becomes entitled to the money; and if the administrator of his estate obtains it, he is personally liable to her in an action for money had and received.*

CHAPMAN, J. This action is founded upon a contract which the plaintiffs allege to have been made between Mrs. Farrelly and Joseph Gray, deceased, who was the defendant's intestate. They allege that she delivered to Gray the sum of five hundred dollars to be put into a savings bank for her, by her maiden name of Ellen Carney, in order that it might be safe for her and her child, so that her husband could not get it; and that he received it and deposited it in the Lowell Institution for Savings to his own credit, "in trust for Ellen Carney," in conformity with this contract. This is the contract which is in issue and on trial in this action; and as Gray, who was one of the parties to it, is dead, the court decided properly that Mrs. Farrelly, the other party, could not be a witness in her own favor. This is the same point that was decided in *Ayres* v. *Ayres*, 11 Gray, 130.

But a contract of that character, followed by a deposit of the money in the name of Gray, in trust for her, would constitute him a trustee. The trust being created by herself, and she being the *cestui que trust*, she might terminate it at her pleasure; and being personal, it would be terminated by his death. The bank book which is in the case expresses such a trust, and is evidence of its existence.

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Upon the decease of Gray, the money would not become a part of his personal assets, but would belong to the *cestui que trust*. Under our present statutes in respect to married women there is no need of a trustee to protect her right to it as her separate property; but she may hold it to her sole and separate use, if it belongs to her, without the intervention of a trustee. The bank book belonged to her, if it shall appear that the money was deposited in trust for her; and when the defendant surrendered it to the bank and had the money transferred to his private account, he became personally liable to her for money had and received to her use. The money was not a part of the assets of the estate before he received it, and his taking it did not convert it into assets, nor can he hold it as administrator. The ruling of the judge that she had no right to maintain the action if she proved the alleged trust was therefore erroneous.

*Exceptions sustained.*

*T. H. Sweetser & W. S. Gardner*, for the plaintiffs, cited *Hunnewell* v. *Lane*, 11 Met. 163.

*D. S. Richardson & G. Stevens*, for the defendant, cited *Buttrick* v. *King*, 7 Met. 20; *Trecothick* v. *Austin*, 4 Mason, 29.

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## Sewall Flint *vs.* Esther Bodge & another.

A judgment in favor of the indorsee against the maker of a negotiable promissory note payable on demand, is conclusive evidence that the maker was indebted upon the same, to the amount of the judgment; and he cannot thereafter, in his capacity of administrator of the estate of the payee, maintain an action against the indorsee to recover the value thereof, on the ground that he was a creditor of the payee, and that the transfer by the payee to the indorsee was fraudulent and void as against him, if there were no other creditors of the payee.

Tort, brought by the administrator of the estate of his mother Sarah Flint, for the conversion of a witnessed promissory note of $381, signed by the plaintiff, dated April 28, 1836, payable to the intestate or order on demand with interest, and indorsed by her in November 1855 to Sarah Flint and Esther Bodge.

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At the trial in the superior court, before *Ames*, J., without a jury, it appeared that in November 1855 the intestate indorsed the note to the defendants, who were her daughters, and who, after her death, brought an action upon it against the plaintiff, who defended on the ground that he had overpaid the amount of it in board, services, &c., to the payee, and that the indorsement was procured by his two sisters by fraud. A verdict was rendered in that action against the present plaintiff, for the full amount of the note, and the jury found specially that the transfer to the present defendants was not invalid by reason of the insolvency of the payee's estate, and that the note had not been paid by the present plaintiff. Exceptions taken to the rulings of the judge were overruled at January term 1863. *Flint* v. *Flint*, 6 Allen, 34.

In February 1862 the plaintiff was appointed administrator of his mother's estate; in January 1863 he filed a representation that the estate was insolvent, and commissioners were appointed, who allowed a large claim in favor of the plaintiff, for board, services, &c., and one other small claim which was proved at this trial to have been then barred by the statute of limitations. There was no other creditor of her estate, and only a very small amount of property.

The judge ruled, on the above facts, that the transfer of the note in November 1855, by the mother to her two daughters, although a gift and upon no pecuniary consideration, was valid, and effectual to pass the title therein, as against herself, and also against her legal representative; that the plaintiff, in order to impeach said transfer as being void as against creditors, must show that at the time of said transfer she was insolvent or embarrassed with debt, or at least that she had creditors for whose payment the proceeds of said note, in whole or in part, would or might be required; that the record and verdict and judgment in the former trial, and the special findings of the jury, had conclusively settled the fact that this plaintiff at the time of the transfer of the note had no claim against the deceased as a creditor, and that the note was the property of the female defendants, subject to no claim or deduction in favor of this plaintiff.



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The judge accordingly found for the defendants; and the plaintiff alleged exceptions.

*A. V. Lynde*, for the plaintiff.

*C. P. Judd*, for the defendants.

DEWEY, J. The right of the defendants to hold the promissory note, the subject of the present controversy, as their property, and to enforce the payment thereof against the maker, was fully settled in the former action between those parties. That judgment is a bar to the present attempt to avoid the transfer of the note, by the alleged indebtedness of the payee to the maker on demands existing prior to the transfer of the note. It was competent in that action for Sewall Flint to avail himself of all payments on the note, and also all equitable set-offs which he might have against the payee, existing prior to the time of the transfer of the note. The judgment in that case has established, so far as respects any indebtedness on the part of the payee to the maker, that the note was not subject to any equitable set-off, and that the transfer was not inoperative by reason of the existence of such indebtedness. The rulings of the court were correct upon the questions of law raised in the case.

*Exceptions overruled.*

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WILLIAM H. SMITH *vs.* EDWIN A. ROBINSON & another.

No sum can be recovered as a forfeiture for usury, under Gen. Sts. *c.* 53, §§ 4, 5, unless there has been an actual payment or tender of more than the amount borrowed with lawful interest.

If a suit in equity is brought to redeem land from a mortgage which was made upon a usurious contract, and the defendant in his answer claims rights under it, and declines to release the same without a further payment, the plaintiff is entitled to a deduction of the statute forfeiture for usury, or so much of it as is required to discharge the amount remaining due on the mortgage, and to judgment for redemption and costs.

BILL IN EQUITY to redeem land from a mortgage. The case was heard in this court before *Gray*, J., who ordered that a decree be entered for the plaintiff for possession of the premises, and for the sum of $49.81, and costs. upon the following facts:

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"The plaintiff being indebted to James W. Bean in the sum of about $300, and Bean being indebted to the defendants in the sum of $662.40, it was agreed by and between the plaintiff, Bean and the defendants, that the plaintiff should make to the defendants a promissory note for one year in the sum of $1000, not bearing interest, secured by mortgage of real estate of the plaintiff in Charlestown, and should pay to the defendants interest at the rate of one per cent. a month on that sum; in consideration of which they should give up their debt against Bean and pay to the plaintiff the balance of the $1000, deducting some items of incidental expenses. Such a note and mortgage were accordingly made by the plaintiff to the defendants, for which the consideration actually paid by the defendants was only the sum of $880, in manner following: $662.40 by discharging their debt against Bean; $13.60 for expenses of making and recording the mortgage deed, and for insurance; and $204 paid in money by the defendants to the plaintiff. The defendants took and reserved to themselves the sum of $120 for interest on their loan to the plaintiff, of which $52.80, (or interest on $880 for one year at six per cent.) was lawful, and $67.20 was usury. Bean became utterly insolvent before making any settlement with the plaintiff, so that the plaintiff never obtained payment of any part of the excess of the sum of $662.40 over his own debt to Bean.

"It was admitted by the parties that the plaintiff had made a tender before bringing this suit; and that, if nothing was to be deducted for unlawful interest from the amount due on the mortgage, the plaintiff was entitled to redeem the land upon payment to the defendants of the sum of $199.28, with interest on that sum from the 12th of November 1864; but that if threefold the amount of unlawful interest taken and reserved by the defendant was to be deducted, then the plaintiff was entitled to a decree for possession of the premises and for payment by the defendants of the sum of $49.81, with interest thereon from the said 12th of November."

The defendants appealed to the whole court.

*C. B. Goodrich*, for the defendants, cited *Simpson* v. *Warren*,

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15 Mass. 460; *Fitzroy* v. *Gwillim*, 1 T. R. 153; *Hindle* v *O'Brien*, 1 Taunt. 413; *Scott* v. *Nesbit*, 2 Bro. C. C. 641; 1 Story on Eq. §§ 301, 302; *Stevens* v. *Lincoln*, 7 Met. 525; *Saunders* v. *Lambert*, 7 Gray, 484.

*C. Robinson, Jr.*, for the plaintiff.

Hoar, J. This case depends upon principles which are familiar and well settled. There are two remedies which the statutes provide for usury; one, where an action is brought upon a contract or assurance, and it appears that a greater rate of interest than is allowed by law has been reserved, taken or received, in which case the defendant shall recover his costs, and the plaintiff shall forfeit threefold the amount of the unlawful interest, and shall have judgment only for the balance due after deducting the forfeiture; and the other, where unlawful interest has been paid, and the person paying it may within two years from the time of payment have an action of contract or bill in equity to recover back threefold the unlawful interest so paid. Gen. Sts. *c.* 53, §§ 4, 5.

In the latter case, no recovery of the forfeiture can be had unless there has been an actual payment of unlawful interest within two years. There is a *locus penitentiæ* to the usurious lender, and if he receives no more than the sum lent, with lawful interest, he does not incur the penalty. *Simpson* v. *Warren*, 15 Mass. 460.

The plaintiff in this suit cannot therefore recover as a penalty any sum whatever, because the amount which has been paid or tendered upon the usurious contract does not equal the amount which he actually received, with lawful interest.

On the other part of the case, it was determined in *Hart* v. *Goldsmith*, 1 Allen, 145, that in a suit in equity to redeem a mortgage, if the defendant by his answer claims the performance of the usurious contract, he is to be considered as an actor within the meaning of the statute, and the mortgagor is entitled to the benefit of the forfeiture for usury in reduction of the sum payable upon the mortgage, exactly as he would have been if the defendant had brought an action to foreclose. The amount of the forfeiture being more than enough to extinguish the whole

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amount due on the mortgage note, after deducting the sum already paid or tendered, the plaintiff is entitled to a decree for redemption, without further payment, and for his costs. He need not have tendered so much as he has; but by doing so, he has deprived himself of the advantage of deducting the whole of the penalty.

*Hart* v. *Goldsmith* has been so recently decided that it is unnecessary to restate the reasons for the decision, the correctness of which we see no cause to question. But there is one remark which was inadvertently made in delivering the opinion in that case, which should be corrected. On page 148 it is said that "if the doctrine urged by the defendant should prevail, the singular result would follow, that this court under one bill in equity might require a sum of money to be paid to him, which the plaintiff might immediately maintain another bill in equity to recover back." This would not be true, if the defendant were only required to pay the sum lent with legal interest, as in such case no penalty would be incurred. It would be true, if the contract were treated as valid notwithstanding the illegal interest reserved; and if no effect whatever were given to the proof of usury on a bill to redeem; so that the plaintiff should be allowed to redeem, only on payment of the whole sum secured by the usurious contract.

*Decree that the plaintiff redeem without further payment, and for his costs.*

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JOHN H. CLARK *vs.* RICHARD PARKINSON & another.

It is not the duty of an officer who serves a writ of possession to expel from the premises any persons who were in possession, claiming title in themselves, at the time when the suit was commenced in which the writ issued, and who do not claim under the person against whom that writ runs, nor resist the officer in his attempt to remove the latter and those claiming under him.

PETITION by a deputy sheriff for an attachment for contempt against the respondents, for resisting the service of a writ of

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possession issued by this court and committed to the petitioner for service.

At the hearing in this court, before *Hoar*, J., notice having been given to the respondents, it appeared that the suit in which the writ of possession issued was brought against a widow who, at the time of the commencement thereof, was in actual occupation of the premises, her son and daughter living with her and claiming title to the premises under their father. The son, who was one of the respondents in this petition, was then under twenty-one years of age. The other respondent married the daughter after the commencement of the suit, and at the time of the marriage came upon the premises, claiming title in right of his wife. The respondents were not parties to the suit in which the writ of possession issued; and they did not resist the removal of the defendant in that suit from the premises, or oppose the officer's putting the plaintiff in possession, so far as that could be done without removing them; but they did threaten and were prepared to use force to prevent the officer from removing them from the land, contending that the precept gave him no right or authority so to expel them, and that it could be fully executed without putting them out.

Upon these facts, the case was reserved for the determination of the whole court.

*J. G. Abbott & G. A. Somerby*, for the petitioner. If the officer had authority to remove the respondents from the premises, it was a contempt in threatening and preparing to resist him by force; and the proper course of the officer was to apply to the court for an attachment. Gwynne on Sheriffs, 420. In serving a writ of possession, the duty of the officer is to put the demandant in actual possession of the recovered premises. A real action is a proceeding *in rem*. In the present case, the writ was served upon the person in actual occupation. Neither of the present respondents could have been made parties to the writ. One of them had then no connection with the premises. The other was an infant, living with his mother. Under such circumstances, no person can get into possession after action brought, and by setting up a claim of title prevent the offic-

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from putting the demandant in actual possession. Otherwise, how can actual possession ever be obtained? When judgment is recovered, somebody else may always be found in possession, claiming title. How is the officer to know whether the pretended title is good or not? He cannot sit on the doorstep to try cases. He is merely a ministerial officer, whose duty it is to obey his precept. There is no way in which the demandant can have possession, unless he is put in possession as against everybody. If the party who is put out has a better title, he may apply for a writ of restitution. But a writ of possession cannot be defeated by a mere claim of title. 3 Bac. Ab. Execution, C, 5; Ejectment, G, 2. *Countess of Rutland's case*, 6 Co. 52 *b*. *Upton* v. *Wells*, 1 Leon. 145. *Howe* v. *Butterfield*, 4 Cush. 306. Crocker on Sheriffs, §§ 554–557. Allen on Sheriffs, 251. N. E. Sheriff, 141. Adams on Ejectment, 306. 1 Rol. Ab. 886.

*T. H. Sweetser*, (*W. S. Gardner* with him,) for the respondents. The respondents, being in possession under claim of title, cannot be adjudged in contempt, under the circumstances of this case. Gen. Sts. *c.* 103, § 15. 1 Roscoe on Real Actions, 340. Even if their acts had been wilful, this process would not lie. The writ of possession was not a judicial writ, but a writ purchased out of the clerk's office; and it is no contempt to resist the service of such a writ. *Birch* v. *Walsh*, 10 Irish Eq. 93. It is believed that there is no case in the United States, where the power to punish such resistance as a contempt has been assumed by the court.

Hoar, J. The court are of opinion that an attachment for contempt should not be granted; because an officer, serving a writ of possession, has no authority by his precept to remove from the land described therein any person who is not a defendant in the suit in which the writ issued, nor holding under a defendant, and who was in occupation of the land at the time the suit was commenced, claiming by a title independent of the defendant. The writ of possession is the result or fruit of a judgment; and the judgment is the legal determination of the rights of those only who are parties or privies to it. Even a judgment *in rem* is binding upon all persons in interest, only

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because all persons in interest are required, and have a right, to come in and assert their title to the property which the judgment binds, in the suit or proceeding in which the judgment is rendered.

It is apparent that the judgment of the court in a real action, although it may determine, as against the tenant, that he held unlawful possession of the demanded premises at the time of bringing the suit, cannot decide this as against any person not privy in estate with him. The judgment may be recovered upon default, which is taken as the confession of the tenant, and can bind no one but himself and those claiming under him. If it is the result of a trial, there is no good reason why it should be held more conclusive upon the possession than upon the title In either case it is a judgment between the parties, upon such a case as they have chosen or have been able to present.

The officer who serves the writ may take a bond of indemnity, and the English text books all state that it is the usual practice to do so. This may dispose of the objection that he is required by his precept to do a precise thing, and that he should not have to determine at his peril whether he is thereby committing a trespass. The writ is procured by the demandant in the real action, and it is for him to take care that he includes in his suit all the actual parties in possession, claiming title.

We find that the text books on the duties of sheriffs all state in general terms that in serving a writ of possession he should remove all persons from the premises; and the digests and *dicta* in reported cases undoubtedly contain a similar statement. They all adopt substantially the same language, which is taken from *Upton* v. *Wells*, 1 Leon. 145. Com. Dig. Execution, A, 5. Crocker on Sheriffs, §§ 554, 556, 557. Allen on Sheriffs, 251. N. E. Sheriff, 141. In *Howe* v. *Butterfield*, 4 Cush. 305, it was said by Mr. Justice Wilde that an officer was authorized and bound, for the purpose of delivering possession of a house, "to remove from the possession all persons therein, and especially those claiming under the party against whom judgment had been recovered." But all these expressions must be construed *secundum subjectam materiem*, and as referring to the tenant, or persons in privity

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with the tenant, or mere strangers or intruders. No case has been cited in which it was decided that one in possession before the commencement of the suit could be lawfully dispossessed upon an execution issuing upon a judgment in a suit between third persons. And in Gwynne on Sheriffs, 418, the rule is stated otherwise, and the true distinction made. In *Ex parte Reynolds*, 1 Caines R. 500, it is said to be "a settled rule of practice, that no tenant who was in possession anterior to the commencement of an ejectment, can be dispossessed upon a judgment and writ of possession, to which he is no party;" and a writ of restitution was ordered. To the same effect are the Kentucky cases in 5 Littell, 305; 1 A. K. Marsh. 333; 2 Ib. 40. See also 2 Tidd's Practice, 1033; *Johnson* v. *Fullerton*, 44 Penn. State R. 466. *Petition dismissed.*

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ELI O. TAYLOR *vs.* JOHN S. C. KNOWLTON.

If personal property which has been attached on a writ is surrendered by the officer to the defendant therein, upon his request, and upon the substitution of an equivalent in money therefor, and the officer thereupon simply returns an attachment of the money, the defendant in the writ cannot maintain an action against the officer for the original attachment of the property, although the writ is not returned to court.

GRAY, J. This is an action of tort against the sheriff of Worcester to recover damages for injuries caused by his deputy to a large number of the plaintiff's hogs, while attaching four of them on a writ against the plaintiff. The deputy wrote a return upon the writ that he had attached fifteen dollars in money, saying nothing about any hogs; and never returned the writ into court, but delivered it to the plaintiff. The defendant introduced evidence that after the attachment of the hogs, and on the same day, by mutual agreement between the plaintiff and the attaching officer, at the request and for the convenience of the plaintiff, the possession of the hogs which had been attached was surrendered to the plaintiff, and this sum of fifteen dollars substituted for them and attached in their stead.

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The court are of opinion that this substitution operated as an accord and satisfaction of any claim by the plaintiff against the sheriff or his deputy for attaching these hogs, and to this extent enabled the defendant to justify under the writ, although it was not returned. The jury having been instructed otherwise, and having been permitted to include in their verdict damages for the taking of the hogs attached, as well as for injuring the other hogs, the defendant is entitled to a new trial.

*Exceptions sustained.*

*T. G. Kent & H. L. Parker*, for the defendant, cited *French* v. *Stanley*, 21 Maine, 512; *Williams* v. *Babbitt*, 14 Gray, 141, and cases there cited; *Fifield* v. *Wooster*, 21 Verm. 215; *Conn* v. *Caldwell*, 1 Gilman, (Ill.) 531.

*T. P. Proctor & W. W. Warren*, for the plaintiff.

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JOHN S. DENNIS *vs.* EDWARD MAXFIELD & others.

If a written contract by which the master of a whaling ship is employed provides that he shall have a certain "lay" on the proceeds and also an additional compensation depending upon the amount of the cargo, and he is wrongfully discharged by the owners before the expiration of the contract, he may recover, as a part of his damages, his share of the earnings of the ship both before and after his removal.

A party cannot except to an erroneous instruction which is given to the jury at his request.

CONTRACT brought by the master against the owners of the whaling ship Harrison, to recover damages for a breach of a contract by which they had employed him for a whaling voyage. The contract was contained in a shipping paper, for "a whaling voyage of five years' duration from the sailing of the said ship from the port of New Bedford, unless said ship shall sooner return to said port and the voyage be terminated;" and in a written agreement by which it was provided as follows: "The said Dennis agreeing on his part to perform a whaling voyage as master of the said ship Harrison, to the best of his ability and knowledge; and the said Maxfield as agent on his part agrees to pay for the services of the said Dennis in the manner

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following: One fourteenth lay on net proceeds of whole cargo, and one dollar per barrel on all sperm oil taken. In addition to the above, to have five hundred dollars if the cargo amounts to $70,000; and $1000 to be added when it shall amount to $90,000; and $2000 more to be added to the aforesaid amount when the cargo amounts to $100,000. Also to have one hundred dollars for each and every thousand dollars that the cargo may exceed one hundred thousand dollars."

The declaration averred that the plaintiff sailed from New Bedford, in pursuance of the above contract, on the 17th of May 1858, and well and truly performed his duty until the 20th of November 1860, when the defendants wrongfully deposed and removed him at the Sandwich Islands.

At the trial in this court, before *Gray*, J., the plaintiff claimed damages, and offered evidence tending to show the same, occasioned to him by the removal, for depriving him of his share of the earnings of the ship before his removal, and for preventing him from receiving his share of the future earnings of the ship on the same voyage, according to the terms of the agreement. The judge was inclined to the opinion that the removal could not deprive him of his share of the previous earnings, and by agreement of the parties this item was not submitted to the jury; but, if this opinion was erroneous, the item was to be referred to an assessor, and the amount found by him added to the verdict, in case the plaintiff should prevail. No evidence was introduced of what the Harrison actually earned after the plaintiff left her, but he introduced other testimony in support of this item of his claim. The defendants objected that the future earnings were merely contingent profits, which could not be a subject of damages in this action; but the objection was overruled.

The court gave instructions to the jury upon what would justify the removal of the plaintiff, and upon the measure of damages in other respects, which were not excepted to. The jury were also instructed, at the request of the defendants, that if the defendants had been injured by any negligence of the plaintiff in the conduct of the voyage, not sufficient, under the other

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instructions given, to justify his removal and prevent him from maintaining his action, then damages might be recouped or deducted from the damages, if any, which they should find the plaintiff to have sustained by the removal. But by consent of both parties, and in order to avoid disturbing the verdict on the main question, the jury were requested, in case they should make any such deduction or recoupment, to return the amount thereof with their verdict.

The jury returned a verdict for the plaintiff, and assessed damages in the sum of $1120.85; and further returned that in assessing these damages they had recouped or set off from the sum originally found by them the sum of $1036.44 as damages caused to the defendants by "mismanagement and neglect of duty" on the part of the plaintiff. The defendants objected to this verdict before it was affirmed, upon the ground that it showed that the plaintiff had no right to maintain his action. But the verdict was affirmed and recorded. The question whether the judgment upon this verdict should be for the plaintiff or for the defendants, and if for the plaintiff, then whether for the sum of $1120.85 or for the sum of $2157.29, was reserved at the request of the parties for the determination of the whole court.

*J. C. Dodge*, for the defendants. The future earnings of the ship were mere contingent profits; and the plaintiff's claim to share in them is to share in possible profits which he might have made out of possible future catchings. There could be no adequate or trustworthy basis upon which a computation of such damages could be founded. For aught that could be made to appear, the plaintiff was benefited instead of injured, by saving his time and labor for the unexpired portion of the contract. See *Brown* v. *Smith*, 12 Cush. 366; *Johnson* v. *Arnold*, 2 Cush. 46; *Flureau* v. *Thornhill*, 2 W. Bl. 1078; *Thompson* v. *Shattuck*, 2 Met. 615; *Blanchard* v. *Ely*, 21 Wend. 342; *Cummins* v. *Spruance*, 4 Harring. (Del.) 315; *Smith* v. *Condry*, 1 How. 28, 35; *The Lively*, 1 Gallis. 315, 325; *The Amiable Nancy*, 3 Wheat. 546, 560; *La Amistad de Rues*, 5 Wheat. 385. The verdict should be entered for the defendants on the finding of the jury. The owners

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were justified in removing a master who by mismanagement and neglect of duty had injured them to the extent found. The plaintiff cannot recover as damages his share of the earnings before his removal. His right to share in the previous catchings was not and could not be affected by the removal. *Bates* v. *Seabury*, Sprague's Decis. 433.

*G. A. Somerby*, for the plaintiff, cited *Brown* v. *Smith*, 12 Cush. 366; *Fox* v. *Harding*, 7 Cush. 516; *Johnson* v. *Arnold*, 2 Cush. 46; *Baxter* v. *Rodman*, 3 Pick. 435; *Masterton* v. *Mayor, &c. of Brooklyn*, 7 Hill, 61; *Clark* v. *Mayor, &c. of New York*, 4 Comst. 338.

Bigelow, C. J. Of the several rulings made at the trial of this case, three only seem to be open for revision on the exceptions.

1. The first relates to the right of the plaintiff to recover in this action the amount of his share of the earnings which had accrued under his contract with the defendants prior to his removal by them from the command of the vessel. The action is brought for a breach of an entire contract for services. The plaintiff has a right to recover as damages the amount which is lawfully due to him under the stipulations by which his compensation for these services was to be regulated and governed. This includes the wages which he had earned previous to his removal, as well as those which he was prevented from earning by his wrongful discharge. The breach of the contract by the defendants has created only one cause of action in favor of the plaintiff. His compensation for this breach necessarily embraces all that he is entitled to recover under the contract. Indeed his right to recover anything, as well that which was earned before as that which would have been earned if he had not been discharged, depends on the question whether he has performed his part of the contract. A party cannot sever a claim for damages arising under one contract so as to make two distinct and substantive causes of action. We are therefore all of opinion that the sum due to the plaintiff prior to his discharge, when it shall have been ascertained by an assessor, ought to be added to the amount of the verdict.

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2. We think it equally clear that the plaintiff is entitled to recover in this action his share or proportion of the future profits or earnings of the vessel after his discharge by the defendants. These constitute a valid claim for damages, because the parties have expressly stipulated that profits should be the basis on which a portion of the plaintiff's compensation for services should be reckoned. These earnings or profits were therefore within the direct contemplation of the parties, when the contract was entered into. They are undoubtedly in their nature contingent and speculative and difficult of estimation; but, being made by express agreement of the parties of the essence of the contract, we do not see how they can be excluded in ascertaining the compensation to which the plaintiff is entitled. Would it be a good bar to a claim for damages for breach of articles of copartnership, that the profits of the contemplated business were uncertain, contingent and difficult of proof, and could it be held for this reason that no recovery could be had in case of a breach of such a contract? Or in an action on a policy of insurance on profits, would it be a valid defence in the event of loss to say that no damages could be claimed or proved because the subject of insurance was merely speculative, and the *data* on which the profits must be calculated were necessarily inadequate and insufficient to constitute a safe basis on which to rest a claim for indemnity? The answer is, that in such cases the parties, having by their contract adopted a contingent, uncertain and speculative measure of damages, must abide by it, and courts and juries must approximate as nearly as possible to the truth in endeavoring to ascertain the amount which a party may be entitled to recover on such a contract in the event of a breach. If this is not the rule of law, we do not see that there is any alternative short of declaring that where parties negotiate for compensation or indemnity in the form of an agreement for profits or a share of them, no recovery can be had on such a contract in a court of law — a proposition which is manifestly absurd.

There are doubtless many cases where no claim for a loss of profits can properly constitute an element of damage in an action for breach of a contract. These however are cases in

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which there was no stipulation for compensation by a share of the profits, and where they were not within the contemplation of the parties, and did not form a natural, necessary or proximate result of a breach of the contract declared on. *Fox* v. *Harding*, 7 Cush. 516. But these cases are no authority for the broad proposition that in no case whatever can profits be included in estimating damages for a breach of a contract. In *Johnson* v. *Arnold*, 2 Cush. 46, cited by the defendants' counsel, the court decided only that, in an action for breach of contract for services, by which it was agreed that a party should be compensated by a share of the profits, the damages were not to be limited exclusively to the loss of profits, but might include other elements, if satisfactorily proved. In *Brown* v. *Smith*, 12 Cush. 366, the action was against the master of a whaling vessel for misconduct and mismanagement, by which the voyage was broken up. It was held that no conjectural or possible profits of the voyage could be taken into consideration in estimating the damages. This decision stands on the ground that there were no stipulations in the contract concerning profits, nor were they, so far as appeared, in contemplation of the parties when the contract was made, nor a necessary or proximate consequence of its breach. Besides; it was only a claim for conjectural or possible profits which was rejected by the court in that case, and not profits which were capable of being proved by competent evidence, as in the case at bar.

3. The remaining ground of exception is to the instruction given to the jury that, if the defendants had been injured by any negligence of the plaintiff in the conduct of the voyage, not sufficient to justify his removal and prevent him from maintaining his action, then damages might be recouped or deducted from the damages, if any, which they should find that the plaintiff had sustained by his removal. We doubt very much the correctness of this instruction. It seems to involve the proposition that the plaintiff could recover damages for a breach of the contract, although he had previously been guilty of violating his part of the agreement. But the instruction was given at the express request of the defendants' counsel. It was the rule of

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law by which he wished the rights of his clients to be tried and determined. His request having been complied with, and the rule of law adopted in conformity therewith, he must now be held to be estopped from objecting to it. As the plaintiff makes no objection to the ruling, and is willing to take the smaller sum found by the jury after making the deduction for which the counsel for the defendants asked, we are of opinion that the verdict must stand affirmed for that sum. *Exceptions overruled.*

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THE PRESIDENT, DIRECTORS AND COMPANY OF THE NEWTON BANK *vs.* LIVERIUS HULL.

A judgment creditor who has levied his execution upon an undivided interest in land of which the judgment debtor was not actually seised cannot maintain a petition for partition thereof, but, under Gen. Sts. *c.* 103, §§ 16, 48, must resort to a writ of entry.

CHAPMAN, J. This was a petition for partition. The petitioners were creditors of Joseph Young, and having obtained judgment and execution against him levied their execution upon one undivided half of a tract of land, which he had, as they allege, fraudulently conveyed to Asbury Young. The levy was made July 25th 1863. Asbury Young had conveyed the land to the respondent previous to the levy, but the petitioners had attached it on mesne process previous to this conveyance.

It is provided by Gen. Sts. *c.* 103, § 16, that where execution is levied on land of which any person other than the debtor is actually seised, the officer shall deliver to the creditor or his attorney a momentary seisin and possession of the land, so far as to enable the creditor to maintain an action therefor upon his own seisin; but he shall not actually expel and keep out the tenant, then in possession, against his will. Section 48 provides that such levy shall be void unless the judgment creditor to whom the land is set off commences his suit to recover possession thereof within one year after the return of the execution

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The purpose of these provisions is to enable the creditor to hold the land if he can establish the fact that it was fraudulently conveyed by his debtor; and at the same time to give the purchaser an opportunity to defend his title without being first disturbed in his possession, and without unreasonable delay.

It is not doubted that a writ of entry would have been a proper suit within the statute, but the respondent contends that a petition for partition is not, and therefore this petition cannot be maintained. Great changes were made by our Revised Statutes in the law of real actions; and under them a petition for partition is in many cases equally effective with a writ of entry. *Marshall* v. *Crehore*, 13 Met. 462. But the court are of opinion that it is not the remedy contemplated by § 48 of the statute cited above. The debtor has a right to redeem the land levied upon within a year, and ought to be enabled to redeem without being subjected to the expenses that may be incurred in a process for partition. The statute contemplates a redemption of the property in the same condition in which it was levied upon. But if the partition shall have been completed, it will not be in the same condition, but will be changed from an estate in common to an estate in severalty. Moreover, the commissioners who make partition have a right to make the quantity and value of the parts unequal, and direct the payment of an equivalent in money. Again, upon the redemption of the property, the creditor is to make a deed of release; but if partition has been completed, he cannot release the same property that was set off to him. It may be that the process for partition will be pending when the land is redeemed; and, if so, the process must fail, and the respondent will be exposed to useless expense. It may be a partial answer to some of these objections that the respondent himself is the person entitled to redeem. But the court cannot know that he is so, because it is a question in respect to which the judgment debtor has not been heard. Not being a party to the record, he may establish his own right to redeem.

In *Ewer* v. *Hobbs*, 5 Met. 1, it was held that this process would not lie between three mortgagees in possession under several



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simultaneous mortgages of the same land, because of the difficulty arising out of the existing rights of redemption that remained in the mortgagor. The objections to the process in that case are somewhat similar to those in this.

*Petition dismissed.*

*T. S. Harlow*, for the petitioners, cited *Marshall* v. *Crehore*, 13 Met. 462, and cases cited; *Baylies* v. *Bussey*, 5 Greenl. 152.

*H. G. Hutchins*, (*G. B. Bigelow* with him,) for the respondent, cited Gen. Sts. *c.* 103, §§ 16, 48; *c.* 136, §§ 1, 3; *Hunnewell* v *Taylor*, 6 Cush. 472; *Ewer* v. *Hobbs*, 5 Met. 1; *Flagg* v. *Thurston*, 13 Pick. 145; *Rickard* v. *Rickard*, Ib. 251.

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ISAAC C. STEVENS *vs.* ABRAHAM STEVENS.

If the purchaser of a homestead, on the day of receiving his deed, borrows money which he applies in part payment therefor, and shortly afterwards, on the same day, executes a note for the money so borrowed, the note is to be regarded as relating back to the time of the actual loan, and as an existing debt at the time of the purchase of the homestead.

WRIT OF ENTRY to recover a piece of land with a dwelling-house thereon in Marlborough.

It was agreed, in the superior court, that on the 1st of Apri 1856, at ten o'clock in the forenoon, the tenant received a deed of the premises, and on the same day moved into the house with his family. On the morning of the same day, the demandant lent to the tenant some money, which the latter paid to his grantor at the time of receiving his deed, as part of the consideration money thereof. At about one o'clock in the afternoon of the same day, the tenant executed to the demandant two notes for the money so borrowed, upon which the demandant subsequently recovered judgment and levied his execution upon the premises which were set off to the demandant at the appraised value o nine hundred dollars.

Upon these facts judgment was rendered for the demandant,

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subject to an estate of homestead in the tenant; and the demandant appealed to this court.

*T. H. Sweetser*, for the demandant.

*T. C. Hurd*, for the tenant.

By the Court. On the peculiar facts of this case, we think the debt on which the demandant recovered judgment and for which he obtained execution which he levied on the demanded premises must be regarded as a debt contracted previous to the purchase of the demanded premises; and that the tenant cannot claim a homestead therein under *St.* 1855, *c.* 238, as against the title acquired by the demandant under his levy. The money was clearly lent by the demandant previous to the purchase of the estate, because it was intended to be used and was in fact appropriated to complete the purchase and obtain the delivery of the deed. The giving of the notes on the same day for the amount lent cannot be considered, under the circumstances of this case, as a payment of the loan or as the contracting of a new debt. There was in fact but a single transaction; the notes were given only as evidence of the amount of the loan, and must be regarded as relating back to and constituting a part of the *res gestæ* attending the negotiation between the parties.

*Judgment for the demandant.*

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## William Payne & wife *vs.* City of Lowell.

If, in an action against a city to recover damages for an injury sustained by reason of a defective way, the defect alleged is ice on a sidewalk, and the defendants have been allowed to prove that rain had fallen and frozen shortly before the time of the accident, so that all the sidewalks in the city were covered with ice, evidence is inadmissible, in their behalf, to prove the steps actually taken by them to remedy the defect.

Tort to recover damages for an injury sustained by the female plaintiff in consequence of a defective way.

At the trial in this court, before *Gray*, J., it appeared that the injury was received by falling upon the ice on a sidewalk in

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Church Street in Lowell, between nine and ten o'clock in the morning, in January; and that it had rained the day before, and frozen in the night. There was also evidence tending to show that there was ice upon the sidewalk at the place of the accident, prior to the rain of the day before; and it was contended on the part of the plaintiffs that this defect already existing was increased by the freezing of the rain. The defendants were allowed to prove that at the time of the accident the sidewalks throughout the city were covered with ice formed during the preceding night. They also offered to prove that, at seven o'clock in the morning, three wagons loaded with sand were sent through the principal streets of the city, and that one of these wagons reached Church Street about nine o'clock, and the place in question was sanded a few minutes after the accident; but this evidence was excluded.

The jury returned a verdict for the plaintiffs, and the defendants alleged exceptions.

*T. Wentworth*, for the defendants.

*T. H. Sweetser*, (*W. S. Gardner* with him,) for the plaintiffs.

Hoar, J. The evidence excluded had no bearing upon the question whether there was a defect in the way. If the defect which caused the plaintiff's injury had existed twenty-four hours then no proof of the attempts made by the defendants to put the way in repair would affect their liability. Gen. Sts. *c.* 44, § 22. The only point to which it was offered was, to meet the allegation that the city had reasonable notice of a defect which had not existed twenty-four hours, and should have repaired the way. The defendants were permitted to show how much there was for them to do on the particular morning in question; and it was for the jury to judge whether there was time before the accident to attend to the place where it happened. But if there was not reasonable time to remedy the defect in the street where the accident occurred, consistently with the duty of the city to give due care to other places equally needing it, the city was not liable, whether wagons were on the way to the spot or not. If there was not reasonable time, the fact that wagons were on the way did not diminish the liability. The duty of the defendants

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at that one time and place was all that was in issue. Whether they did their duty elsewhere, or neglected it, was immaterial. The evidence was therefore rightly rejected.

*Judgment on the verdict.*

JESSE HUSE *vs.* CITY OF LOWELL.

If one who has been authorized by the school committee of a city to take charge of an evening school employs a person to render needful assistance in preserving order outside of the door while the school is in session, the city is liable to pay a reasonable compensation to such person, although the committee have never acted as a body upon this particular matter; and, in such case, evidence is incompetent to show that in former years the school was under the sole control of the committee, or that the committee had rejected the claim for compensation.

A truant officer, appointed under Gen. Sts. c. 42, § 5, does not hold over after the expiration of his year, although no other has been appointed in his place.

CONTRACT brought to recover for services rendered by the plaintiff to the defendants. At the trial in the superior court, before *Putnam*, J., a verdict was returned for the plaintiff, by direction of the court, upon facts which are sufficiently stated in the opinion. The defendants alleged exceptions.

*T. Wentworth*, for the defendants, cited *Perley* v. *Georgetown*, 7 Gray, 464.

*T. H. Sweetser & A. F. Jewett*, for the plaintiff.

CHAPMAN, J. The first item in dispute between the parties is the charge for services as an officer to keep order about the building in which one of the free evening schools of the city was kept It appears that the city council appropriated a certain sum ($500) to support the schools of this character, and that a small sum ($14) was added to it by the contributions of individuals. Rev. Mr. Wood, the city missionary, who had originally established these schools, was authorized by the school committee to take charge of them, and did so, and had charge of them during the time when the plaintiff performed his services. He deemed it necessary that the plaintiff should perform the service, and requested him to do so. He also applied to the mayor, who was

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a member of the school committee, and the mayor designatec the plaintiff as a proper person to be employed, and did employ him. But it is objected that the school committee, as a body were not consulted and did not act on the subject, and therefore there was no legal contract made with the plaintiff which is binding upon the city.

It is true that, in the establishment of schools, some of the duties to be performed by the school committee must be by formal votes, passed at regular meetings. But the charge and superintendence of schools which they are to take is general. Gen. Sts. *c.* 38, § 16. It need not be particular, or extend to subordinate matters. It would be impracticable to make it so. The keeping of the school-houses clean and in repair, the supply of fuel and care of fires, must be delegated to some one. The preservation of order is necessarily delegated to the teacher in ordinary cases, and in extraordinary cases the superintendent may furnish him with such assistance as is necessary and reasonable. The plaintiff was employed by the superintendent to aid the teacher in preserving order at the evening school about the door of the house, where it appears that persons not belonging to the school assembled and were inclined to make disturbance. It was obviously proper that a police officer should be employed to render this assistance to the teacher; for the teacher's attention could not with propriety be drawn from his duties inside, to keep order at the door. This is a subordinate matter, which it would be unreasonable to regard as belonging to the school committee exclusively, and not capable of delegation. The court are of opinion that it was within the fair interpretation of the authority granted to Mr. Wood, and that the plaintiff is entitled to recover for the service thus rendered by him.

The bills of expenses incurred for the schools in former years, the rejection of the plaintiff's bill by the school committee, and the records of the school committee rejecting the plaintiff's bills were properly excluded as evidence. They had no tendency to prove that Mr. Wood had not authority to employ the plaintiff or that he did not perform the service.

The item for services as truant officer from January 13th tc

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February 24th 1863 cannot be recovered. A truant officer does not hold over until another is appointed, but his office expires at the end of the municipal year. Gen. Sts. *c.* 42, § 5. The plaintiff was appointed in January 1862. Two other truant officers were appointed at the same time. On the first Monday of January 1863 the city government went out of office. On the 13th of January 1863 two truant officers, only one of whom was an officer of the preceding year, were appointed for that year. If we were to hold that any of the old officers held over, we could not determine whether it was the plaintiff. But the appointment of two new officers must be regarded as terminating the official power of the former officers.

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PETER MCANEANY *vs.* JOSHUA JEWETT.

A dog at play with his owner's son upon his owner's land is not "at large," within the meaning of Gen. Sts. *c.* 88, § 58; and a constable who under such circumstances calls him away, and shoots him while he is upon his owner's land, and then enters upon such land and pursues him for the purpose of shooting him again, is liable in damages therefor.

If a case is submitted to the court upon an agreed statement of facts, in which the damages are not fixed or an assessment thereof provided for, the judgment, if for the plaintiff, will be for nominal damages only.

TORT in the nature of trespass *quare clausum fregit.*

The following facts were agreed in the superior court: The plaintiff owned a house and land in Chelmsford, and had in his keeping a dog which was not licensed or collared according to Gen. Sts. *c.* 88, § 58. The defendant was a constable of that town, and had been ordered by the selectmen to kill all dogs going at large which were not so licensed and collared. The defendant with a pistol walked in the road past the plaintiff's house, stopping at a point fifty feet distant therefrom, and saw the dog within a few feet of the house, near the plaintiff's son, who had just been playing with him on the plaintiff's premises and near where he then was, and called the dog by his voice and a motion of his hand. The dog upon being so called left the

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boy and went towards the defendant, to a point within ten feet of the fence, and the defendant then fired at him, putting a ball through his ear. The dog then ran, and the defendant got over the fence into the plaintiff's premises and pursued him, attempting to shoot him again, until he ran into the front door of the house.

Upon these facts judgment was rendered for the defendant, and the plaintiff appealed to this court.

*G. Stevens*, for the plaintiff, cited *Commonwealth* v. *Dow*, 10 Met. 382; 2 Bl. Com. 393.

*A. J. Stackpole*, for the defendant.

Hoar, J. Without undertaking to give a definition of the phrase "going at large," as applied to dogs, which would include every case that might arise under the statute upon which the defendant relies for his justification, we are of opinion that the plaintiff is entitled to judgment. The defendant entered the plaintiff's close without his consent. The dog was in his owner's door-yard, and near his boy, who had just been playing with him. But for the defendant's interference, there is nothing to show that he would not have remained there quietly. The defendant first enticed him away from the boy, and then entered the close for the purpose of killing him. We do not think the dog was "at large," in the sense of the statute, when the defendant first called him away from the boy. If he went at large afterward, he was set at large by the defendant, who could acquire no right by that act to enter the close of his owner for the purpose of killing him. The damages not being agreed by the parties, the plaintiff will have judgment for nominal damages only.

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JERUSHA B. WYMAN & others *vs.* HANNAH W. SYMMES.

The executor named in a will is a competent subscribing witness thereto, and may testify in support thereof, under the statutes of this commonwealth, although he has not declined the trust.

APPEAL from a decree of the judge of probate, admitting to probate an instrument purporting to be the will of Joseph Wyman. There were three subscribing witnesses to the will, one of whom was also one of the executors named therein, and had not declined the trust. The questions whether he was a competent subscribing witness, and if so whether he would be admissible to testify in support of the will at the trial, were reserved by *Gray*, J. for the determination of the whole court.

*J. P. Converse*, for the appellant.

*J. G. Abbott & W. E. Parmenter*, for the appellees.

GRAY, J. It was long ago decided by this court that an executor named in the will had no such interest in the estate as to make him incompetent to be an attesting witness to the will. *Sears* v. *Dillingham*, 12 Mass. 358. Like decisions have been made in other states. Redfield on Wills, 258, and cases cited. *Richardson* v. *Richardson*, 35 Verm. 238. *Jones* v. *Larrabee*, 47 Maine, 474. Indeed the objection to the competency of the executor as an attesting witness was not much pressed at the argument. And we have no doubt that this will was duly attested.

But the heirs at law contend that the executor, not having declined his trust, is not a competent witness to testify in support of the will at the trial of the issues raised on its being offered for probate.

The decision of this question depends upon the true construction of the recent statutes of the Commonwealth. Before the passage of those statutes, the executor, being directly interested in the costs of the proceedings for the probate of the will, was held to be incompetent to testify at the hearing. *Sears* v. *Dillingham*, above cited.

The rule of the common law, by which interested witnesses were disqualified from testifying has been abrogated in this

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commonwealth by providing, first, that no person should be excluded by reason of interest from testifying in any cause, and afterwards that parties in all civil actions, including probate proceedings, should be admitted as competent witnesses for themselves or any other party. But these statutes expressly declare that these provisions "shall not apply to the attesting witnesses to a will or codicil." *Sts.* 1851, *c.* 233, § 97; 1852, *c.* 312, § 60; 1857, *c.* 305, §§ 1, 3. Gen. Sts. *c.* 131, §§ 13–15. The question therefore is of the meaning of this saving clause.

The argument for the appellants is, that the provisions removing the disqualification of witnesses as interested or parties relate to their capacity to testify in court, and that the limitation that these provisions "shall not apply to the attesting witnesses to a will or codicil" creates an exception to the rule thus established, takes such witnesses entirely out of the operation of these provisions, and leaves their competency to testify to be determined by the rules of law previously in force. But the court are of opinion that this rests upon too narrow and literal a construction of the statutes.

These statutes have made a large and radical change in the policy of the law, and manifest the intention of the legislature (except in a few cases governed by peculiar considerations of justice and policy) to submit the degree in which interest may affect a witness to the consideration of the jury, instead of wholly depriving them of the assistance of his testimony. Under these provisions, no one doubts that an executor, or even a devisee or legatee, whatever the extent of his interest in establishing the will, if not one of the attesting witnesses, would be a competent witness in its support; or that an heir at law or personal representative of the deceased, however much interested to defeat the will, would be a competent witness against it. It is not easy to perceive any reason why the possibility of being obliged to pay costs should be allowed greater weight than a valuable stake in the property in controversy; nor why persons competent to attest the will should, for a degree of interest insufficient to exclude any one else, be prevented from testifying to the very facts which it was one object of their attestation to teach

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them. The words of the section relied on do not require such an exclusion; but may be more reasonably satisfied by limiting their operation to attesting witnesses as attesting witnesses, and not as testifying witnesses, and holding the words to mean simply that the rule which controls the giving of testimony in court shall not apply to the signing of the attestation of the will.

The provision of the Rev. Sts. *c.* 62, § 6, retained in the Gen. Sts. *c.* 92, § 6, that "if the witnesses are competent at the time of attesting the execution of the will, their subsequent incompetency, from whatever cause it arises, shall not prevent the probate and allowance of the will, if it is otherwise satisfactorily proved," may have its full effect, notwithstanding the change in the law, by applying it to those who, by the death of a person named in the will after its execution and before it takes effect, acquire an interest in the estate as his heirs or representatives.

*Case to stand for trial.*

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GEORGE SPARHAWK *vs.* ELISHA D. SPARHAWK & others.

An heir at law, who is disinherited, is a competent witness in support of the will.

APPEAL from a decree of the judge of probate, disallowing an instrument offered for probate as the will of Catherine S. Cole.

It was agreed that Mrs. Cole, at the times of the execution of this instrument and of her death had no father, mother, husband or children living; that she died possessed of considerable property; that Edward Sparhawk, one of the three attesting witnesses, was her brother and an heir at law, and that the instrument contained no devise or bequest to him, but gave nearly all the property to his son. The question whether he was a competent attesting witness was reserved by *Gray*, J. for the determination of the whole court.

*H. W. Paine & J. P. Converse*, for the executor, cited Gen. Sts. *c.* 92, § 6; *Haven* v. *Hilliard*, 23 Pick. 10; *Hawes* v. *Humphrey*, 9 Pick. 350; *Smith* v. *Blackham*, 1 Salk. 283; *Clark*

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v. *Vorce*, 19 Wend. 232; 1 Greenl. Ev. §§ 386–390, and cases cited.

*C. Robinson, Jr.*, (*J. Rutter* with him,) for the heirs at law.

Bigelow, C. J. The provisions of Gen. Sts. *c.* 131, §§ 13, 14, abolishing the disqualification of witnesses on the ground of infamy and interest, and permitting parties to the record in all civil actions and proceedings to testify, do not apply to attesting witnesses to wills or codicils. By § 15 these are specially excepted from the operation of the two preceding sections. We must therefore have recourse to the well settled rules of the common law, as they existed prior to the enactment of the above cited provisions, in order to determine whether a witness to a will is competent as a subscribing witness at the time of the attestation of the instrument and its execution by the testator. It is to be borne in mind that the question to be determined in this case is not whether the witness objected to at the trial was competent to give evidence in the case, but whether he was competent according to the rules of the common law to act as a subscribing witness. If he was, then the will was duly attested; but if he was not, then the will cannot be admitted to probate, because it was not subscribed in the presence of the testator by three competent witnesses.

The much vexed question as to the true construction of the words "credible witnesses" in the English statute of wills was early settled by this court, in *Amory* v. *Fellowes*, 5 Mass. 219, 229, in which it was held that the word "credible" was used as equivalent to "competent," and that a witness was admissible to prove the execution of a will "whom the law will trust to testify to a jury." This construction was confirmed by several subsequent decisions; *Sears* v. *Dillingham*, 12 Mass. 358, 361, *Hawes* v. *Humphrey*, 9 Pick. 350, 356; *Haven* v. *Hilliard*, 23 Pick. 10, 17; and was incorporated into Rev. Sts. *c.* 62, § 6, by changing the phrase "credible witnesses" into "competent witnesses." Rep. of Com. on Rev. Sts. *c.* 62, § 4. The same phraseology is contained in Gen. Sts. *c.* 92, § 6.

There can be no doubt that these words have a "peculiar and appropriate meaning in the law," and that in interpreting them

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it is our duty to give them that meaning. This is the rule of exposition prescribed in Rev. Sts. c. 2, § 6, and Gen. Sts. c. 3, § 7. A competent witness, according to legal intendment, is one who is entitled to be examined in a court of justice, and of whose credibility the court and jury are by the well settled rules of law permitted to judge. He must be so situated, in respect to the issue depending between parties to a cause or proceeding, or to the particular fact concerning which he is called to testify, and must have such sense of the obligation of an oath, as to come within the class of persons whom the common law deems it safe and wise to admit to give testimony in judicial investigations. In general, if a witness is not wanting in religious belief, if he has not been rendered infamous by conviction of crime, and has no pecuniary interest in the event of the suit in which he is called to testify, he is admissible and competent as a witness. There are no other tests by which, under the rules of the common law, a court can determine whether a witness is to be excluded or admitted, and, so far as we know, no other have ever been applied in any of the cases which have arisen under the statute regulating the attestation of wills. Certainly, in all of those which have heretofore been decided by this court, the struggle has been whether the witness had at the time of attestation such pecuniary interest in the event of the suit as to be then disqualified as a witness to testify concerning the signing of the will by the testator, according to the established rule of evidence at common law, as recognized and acted on in courts of justice.

Applying this rule to the facts agreed in the present case concerning the situation and relation of the attesting witness, we are unable to see any valid ground of objection to his competency. It is conceded that he was one of the heirs at law of the testatrix, and, if she had died intestate, he would have been entitled to one fourth part of her estate. It is also agreed that by her last will the testatrix devised and bequeathed the larger part of her estate to the son of the attesting witness, and made no devise or bequest whatever to the latter. It is very clear, therefore, that the pecuniary interest of the witness would be

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promoted by a failure to prove the due attestation of the will, and that his testimony in support of it would operate directly against this interest. It is contended, however, that the fact that he was the heir at law of the testatrix, and in the event of intestacy that he would be entitled to a distributive share of the estate of his sister, gave him an interest in the subject matter. In a certain sense this is true. He had an interest in the question whether his sister should die testate or intestate, because on this contingency depended his own claim to share in her estate. But the insuperable difficulty in the way of holding this fact to be a disqualification of him as a witness is, that by the rule of law interest of itself, without regard to its nature or bearing on the issue, never operated to exclude a witness from giving evidence. It is only when the pecuniary interest of a person will in some way and to some appreciable extent be aided or promoted by a judgment or decree in favor of the party calling him, that he is excluded from testifying, according to the rule of the common law. So plain is this, that it is said by Professor Greenleaf in 1 Greenl. Ev. § 410, that "it is hardly necessary to observe, that when a witness is produced to testify against his interest, the rule that interest disqualifies does not apply, and the witness is competent." Nor is this all. Not only does such an interest not disqualify a witness, but it is always deemed to be a circumstance legitimately entitled to great weight in judging of the credibility of a witness, that he is called to testify adversely to his own interest. This rule of the common law which excludes a witness from giving evidence in favor of his own interest is said to be founded on the close and intimate connection which experience has shown to exist between the situation of a witness and the truth or falsity of his testimony. The common law rejected the evidence of persons called to testify in support of their interest, not because persons so situated might not sometimes state the truth, but because a long acquaintance with and familiar knowledge of proceedings in courts had shown that men were subject to be greatly swayed and influenced in their testimony by having a private pecuniary interest in the favorable result of a cause which they were called to support by their

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evidence; and that, if allowed to give testimony in such cases, it would tend to the commission of perjury, and to mislead rather than to guide juries in the investigation of truth. It is obvious that the reason on which the rule is founded has no application where the testimony which a witness is called to give will operate to the prejudice of his rights or interest, or in no way tend to promote them.

Nor can we see any greater difficulty in applying the ordinary rule of exclusion on the ground of interest to an attesting witness to a will than to one who is called to testify in the trial of an action at law. In the latter case the test of competency is, whether the witness will gain by a decision of the case in favor of the party who offers him as a witness. It does not depend on the nature of his evidence or the facts to which he is expected to be a witness. The question is not whether he shall be permitted to give a certain kind of evidence, or to testify to particular facts and not to others, but whether he can be admitted to testify at all. So in case of the attestation of a will. The competency of the witness is to be settled by his situation at the time of attestation, with respect to the subject matter and the contents of the will. The question is not whether he will testify in support of or adversely to the establishment of the will, but whether his situation and relation to the testator or testatrix, and the disposition of the property by the will, were such, when the will was made, that he can be admitted to testify at all. Nor is it at all material to the question of competency that the contents of the will were unknown to the witness at the time of attestation. The law does not look to the consciousness or knowledge of a party to ascertain whether he is competent to testify. It is the fact of a present existing interest which disqualifies. If this exists, the witness is incompetent; if no interest is shown, then he is competent, irrespective of his knowledge of an absence of interest in the subject matter in controversy. If, by the terms of the will, its admission to probate would operate favorably to his interests, he is incompetent to attest the execution of the instrument. He then has a direct pecuniary interest in the proof of the fact to which he is called to bear witness.

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The principles of law regulating the competency of attesting witnesses to wills are correctly stated in *Haven* v. *Hilliard*, *ubi supra*. It is true that in giving an exposition of the provisions of a statute affecting the validity of the attestation in that case, certain illustrations were used by the court which seem to give countenance to the doctrine that a witness to the execution of a will may be incompetent even where his interest was adverse to its establishment and validity. But the case itself shows that no point concerning the competency of witnesses so situated was there raised, and that the language of the court, though liable to misapprehension, was not intended as a decision of that question. Certainly so far as it seems to support the proposition that an heir at law, who is disinherited in whole or in part by a will, is incompetent as an attesting witness, the case is contrary to well settled principles, and must be overruled.

*Case to stand for trial.*

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ELBRIDGE GERRY *vs.* DANIEL GERRY & another.

**If a trustee process is brought against two defendants and two trustees, describing them individually and not as partners, and the trustees are summoned as partners only, the latter are entitled to only one bill of costs, although they make four different answers.**

TRUSTEE PROCESS against Daniel Gerry and Sarah Gerry, his wife, upon a judgment recovered by the plaintiff against them. George W. Trowbridge and Leander F. Lynde were summoned as trustees, the writ not describing them as partners. The officer's return showed that he summoned the trustees by delivering a copy to Trowbridge, "he acknowledging service for the firm of Trowbridge & Lynde." Trowbridge and Lynde each filed two answers, by the same attorney, who claimed four bills of costs in their behalf; but only one bill of costs was allowed in the superior court, and the trustees appealed to this court.

*A. V. Lynde*, for the trustees.

*J. P. Converse*, for the plaintiff, was not called on.

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By the Court. The trustees were summoned as copartners only. No service was made on them individually. The answer of one copartner only was necessary. *Taxation affirmed.*

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## Thomas Kennedy *vs.* Lizzie G. Doyle.

If one of two defendants goes into insolvency, and this fact is suggested, the court may order the trial to proceed as to the other defendant.

A promise by a minor to pay money borrowed on joint account with another person may be ratified by the minor after coming of age, like other voidable promises.

The entry of a baptism, contemporaneously made by a Roman Catholic priest, in the discharge of his ecclesiastical duty, in his church record of baptisms, is competent evidence after his death, of the date of the baptism, if the book is produced from the proper custody; although he was not a sworn officer, and the record was not required by law to be kept.

Gray, J. 1. This action was brought against two sisters upon an agreement of both to pay money borrowed by them on their joint account from the plaintiff. One of them suggested her insolvency, and set up no other defence. The other pleaded infancy at the time of the agreement. It was within the discretion of the presiding judge to order the trial to proceed against her alone.

2. The agreement, if made when she was under age, stood, as against her, on the same ground as any other contract by an infant for anything but necessaries. It was voidable and not void, and, if affirmed by her after coming of age, was binding upon her.

3. The remaining exception presents an interesting and important question of evidence. The parties being at issue upon the point whether the defendant was of age when she made the agreement, the plaintiff, to prove that she was, offered a book, which was admitted to be the church record of baptisms in a Roman Catholic church in Lowell, regularly kept by McDermott, the priest of that church for a series of years, produced from the custody of O'Brien, the present priest, into whose hands it came



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upon the death of McDermott, and containing the following entry in McDermott's handwriting, and signed by him: "1837 December 17th. Baptized Joanna, born 12th, of Michael and Mary Doyle. Sponsors, Jeremiah Kennedy and Bridget Doyle." There was also evidence that the defendant in this action was the Joanna Doyle named in this record. It does not appear to have been denied at the trial, and it was assumed at the argument, that the priest performed the rite of baptism and made the entry upon the record in the discharge of his ecclesiastical duty, according to the rule and custom of his church. But there was no evidence that he was a sworn officer, or that the book was required by law to be kept; and upon this ground the defendant objected to its admission. The presiding judge, however, admitted it as competent evidence of the date of the baptism only.

In England, a church record of baptisms, kept by a clergyman of the established church, is admissible, even before his death, accompanied by evidence of the identity of the child, to prove the date of its baptism; but not the time of its birth, because the clergyman has no authority to make inquiry about the time of birth or any entry concerning it in the register. *Draycott* v. *Talbot*, 3 Bro. P. C. (2d ed.) 564. *May* v. *May*, 2 Stra. 1073. *Wihen* v. *Law*, 3 Stark. R. 63, and other cases cited in Stark. Ev (4th Eng. ed.) 299, note *f*. *Doe* v. *Barnes*, 1 M. & Rob. 389. In the Church of England, from the time of the Reformation, registers of baptisms, weddings and burials were kept by order of the crown as head of that church; and, in the words applied by Lord Chief Baron Gilbert to the original order of Henry VIII. on this subject, "when a book was appointed by public authority, it must be a public evidence." Gilb. Ev. (3d ed.) 77. Lord Coke, in Noy, 146. Hubback on Succession, 470–474. The ordinances of the English Commonwealth in 1644 and 1653 provided for the registration of births, deaths and marriages. Scobell's Ordinances, 76, 236. *Dudly's case*, 2 Sid. 71. But these ordinances were annulled upon the restoration of Charles II And registers kept under ecclesiastical authority continued to be admitted in evidence by the courts, although not require-

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to be kept, nor declared to be evidence, by any statute. This is probably the meaning of Lord Holt's *dictum* that such registers are evidence from "the nature of the thing," and of the additional words attributed to him by one reporter of least authority — "though no law for it." *Stainer* v. *Burgesses of Droitwich*, 1 Salk. 281; *S. C.* 12 Mod. 86; Skin. 623; Holt, 290 About the time of the decision of that case, acts of parliament began to be passed, which were repealed or altered from time to time, for the registration of births or baptisms, marriages and burials, generally limited to the established church; and (unless for a few years towards the end of the last century) the law of England does not seem to have provided for registering births or deaths of any person, nor baptisms, marriages or burials in any form except that of the established church, from 1706 until 1836, when the general registration act of 6 & 7 Will. IV. *c.* 86, was passed. Hubback on Succession, 475–477, 493, where the statutes are cited. The English judges, adhering to the principle of admitting in evidence as public documents those registers only which the law required to be kept, have considered all others as mere private memoranda, and have refused to admit registers regularly kept by dissenters unless supported by the testimony of the person keeping them or other witnesses. *Birt* v. *Barlow*, 1 Doug. 171. *Newham* v. *Raithby*, 1 Phillim. R. 315. *Ex parte Taylor*, 1 Jac. & Walk. 483; *S. C.* 3 Man. & Ry. 430 *n.* *Doe* v. *Bray*, 8 B. & C. 813; *S. C.* 3 Man. & Ry. 428. *Whittuck* v. *Waters*, 4 C. & P. 375. Vice Chancellor Shadwell refused even to admit an entry in the register of the Roman Catholic chapel of the Sardinian ambassador in London as evidence of the baptism of the ambassador's son. *D'Aglie* v. *Fryer*, 13 Law Journal, N. S. Ch. 398. "The principle on which entries in a register are admitted," said Mr. Justice Erle in a recent case, "depends upon the public duty of the person who keeps the register to make such entries in it, after satisfying himself of their truth." *Doe* v. *Andrews*, 15 Q. B. 759. See also *Conway* v. *Beazley*, 3 Hagg. Eccl. 651; *Athlone's claim*, 8 Clark & Fin. 262; *Earldom of Perth*, 2 H. L. Cas. 873, 874; *Coode* v. *Coode*, 1 Curt. Eccl 764–767 Hubback on Succession, 161, 365, 366, 514.

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Almost two centuries before the passage of the statute of Will. IV., the founders of the Massachusetts Colony, though not less attached than other Englishmen to their own forms of religious worship, had the wisdom to perceive that it was more important for the civil government to preserve exact records of the dates of births and deaths, than of religious ceremonies from which they might be imperfectly inferred; and that the importance of recording those facts did not depend on the particular creed or church government of the individual, but applied equally to the whole people. They accordingly left the baptism of the living and the burial of the dead to the churches; but by an ordinance of 1639 enacted "that there be records kept of the days of every marriage, birth and death of every person within this jurisdiction;" and similar statutes have been ever since in force in Massachusetts. 1 Mass. Col. Rec. 276. 4 Ib. pt. 1, 290. Prov. Sts. 4 W. & M. *c.* 10; 4 & 5 W. & M. *c.* 21; 7 Will. III. *c.* 6, (ed. 1726,) 17, 36, 70. Anc. Chart. 43, 181, 182, 243, 256, 285. Sts. 1786, *c.* 3, § 6; 1795, *cc.* 7, 69. Rev. Sts. *c.* 15, §§ 46, 47; *c.* 75, §§ 17, 18, 23. Gen. Sts. *c.* 21; *c.* 106, §§ 16, 17. The record of a marriage by the justice of the peace or minister, or the town clerk's or registrar's record of births, marriages and deaths, kept as required by these statutes, or a duly certified copy of either, is held competent evidence. 2 Dane Ab. 296. *Milford* v. *Worcester*, 7 Mass. 56. *Commonwealth* v. *Norcross*, 9 Mass. 492. 1 Stark. Ev. (4th Amer. ed.) 174, Metcalf's note The provision introduced into the Rev. Sts. *c.* 75, § 25, and reënacted in the Gen. Sts. *c.* 21, § 6, and *c.* 106, § 21, is but declaratory of the law in this commonwealth. Similar decisions have been made in other states, generally upon the ground of the record having been kept in the performance of a duty imposed by law; and those cases, in the reports of which no statute is referred to, may yet have been controlled by statute; just as the record admitted by the supreme court of the United States in *Lewis* v. *Marshall*, 5 Pet. 475, 476, was evidently kept according to the act of the provincial assembly of Pennsylvania of 1705, cited in *Stoever* v. *Whitman*, 6 Binn. 416.

It is perfectly true that in this commonwealth the law makes

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no distinction between different sects of Christians, and the record of a Roman Catholic priest is of no less weight as evidence than that of a Congregational, or Protestant Episcopal, or any other minister. But our law not requiring any record of baptisms, the church book offered in evidence in this case, not having been kept under any requirement of law, was not a public record, and would not, had the priest who made the entries been still alive, have been admissible in evidence, unsupported by his testimony.

It becomes necessary, therefore, to determine whether his death has made his register competent evidence. Upon this question there seems to be some conflict of opinion in England.

The cases in which the registers of clandestine marriages in the neighborhood of the Fleet Prison in London have been rejected, even after the death of all the witnesses to the marriage, may be laid out of consideration; for those registers were not only kept without authority, but the marriage ceremonies there recorded were performed in direct violation of law, and the books showed upon their face that they were unworthy of credit. *Read* v. *Passer*, 1 Esp. R. 213; *S. C.* Peake R. 231. *Lloyd* v. *Passingham*, Coop. 155. *Nokes* v. *Milward*, 2 Addams, 391. *Doe* v. *Gatacre*, 8 C. & P. 578, and *note*.

The leading cases upon this subject are those in which Lord Holt held that entries, made in a tradesman's books by his servant or drayman in the usual course of his employment, were admissible in evidence after the death of the latter, upon proof of his handwriting. *Pitman* v. *Maddox*, 2 Salk. 690; *S. C.* 1 Ld. Raym. 732; Holt, 298. *Price* v. *Torrington*, 1 Salk. 285; *S. C.* 2 Ld. Raym. 873; Holt, 300. It was long since settled beyond controversy in England that an entry of the receipt of tithes in the books of a deceased rector was evidence for his successor; and the reason for this, assigned by Lord Hardwicke and Lord Ellenborough, was the absence of all interest to misstate, inasmuch as the entries could not be evidence for him during his life, and his representative would have nothing to do with the living after his death. *Glynn* v. *Bank of England*, 2 Ves. Sen. 43. *Roe* v. *Rawlings*, 7 East, 290, 291. So courts of law have admitted the

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books of charges of a deceased attorney, and courts of chancery those of a deceased solicitor, for professional services, as evidence of the acts having been done for which the charges were made. *Warren* v. *Greenville*, 2 Stra. 1129. *Doe* v. *Robson*, 15 East, 32. *Skipwith* v. *Shirley*, 11 Ves. 64. *Ward* v. *Garnons*, 17 Ves. 140, 141. *Rawlins* v. *Rickards*, 28 Beav. 370. Memoranda, signed by an attorney, of his having served an order of notice have been held competent evidence after his death. *Doe* v. *Turford*, 3 B. & Ad. 890. *Stapylton* v. *Clough*, 2 El. & Bl. 937, 938. And an entry made by a deceased clerk in a notary's book, of the dishonor of a bill of exchange, was admitted, on the ground, as stated by Lord Chief Justice Tindal, "that it was an entry made at the time of the transaction, and made in the usual course of business, by a person who had no interest to misstate what had occurred." *Poole* v. *Dicas*, 1 Bing. N. C. 652.

In *Higham* v. *Ridgway*, 10 East, 109, entries of charges in the books of a deceased man midwife, marked therein as paid six months afterwards, were admitted as evidence of the time of the birth of the child. It is true that one reason assigned by the court was that they were against his interest, yet, as was said by Mr. Justice Story, "this seems very artificial reasoning," especially in view of the fact that the payment was made six months after the charge. *Nicholls* v. *Webb*, 8 Wheat. 335. And the supreme judicial court of Maine, in a well considered case, admitted charges in the books of a deceased physician in the regular course of his business, without evidence of payment or any other circumstance bearing against his interest. *Augusta* v. *Windsor*, 19 Maine, 317.

Lord Chancellor Plunket repeatedly admitted the books of a Roman Catholic chapel in Dublin, made by Roman Catholic priests whose deaths and handwriting were proved, as evidence of marriages and baptisms, and on the last occasion, after argument, gave this reason for their admission: "They are the entries of deceased persons, made in the exercise of their vocation contemporaneously with the events themselves, and without any interest or intention to mislead." *O'Connor* v. *Malone*, 6 Clark & Fin. 576, 577. *Malone* v. *L'Estrange*, 2 Irish Eq. R. 16

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In some modern English cases, the judges have shown an inclination to limit the admission of entries made in the course of business; and to rest the earlier decisions, more than those who made them did, on the hypothesis that the entries were against the interest of the person making them. This tendency appears very strongly in the judgments of Lord Denman. *Chambers* v. *Bernasconi*, 1 Cr., Mees. & R. 347; *S. C.* 4 Tyrwh. 531. *Rex* v. *Cope*, 9 C. & P. 727. *De Rutzen* v. *Farr*, 4 Ad. & El. 56; *S. C.* 5 Nev. & Man. 620. *The Queen* v. *Worth*, 4 Q. B. 132. 1 Smith's Lead. Cas., note to *Price* v. *Torrington*.

In the case of *Davis* v. *Lloyd*, 1 Car. & Kirw. 275, to show the infancy of one party, the other offered in evidence the book of a Jewish synagogue in the handwriting of the chief rabbi, who had since died, containing an entry of the circumcision of the party by him; and offered to show that by the Jewish law the custom was for a child to be circumcised on the eighth day after his birth, and it was the duty of the chief rabbi to perform the rite and make the entry. Lord Denman, after consulting Mr. Justice Patteson, would not admit the evidence. No reasons are reported, and as the party who offered the evidence prevailed, the case was not brought before the court in bank. The facts were very similar to those now before us, with one important difference. Here, the record was offered in order to prove full age, and was admitted only to show that the child was in being when the record was made. There, the evidence was offered to prove infancy, by the aid of presuming the child to have been only eight days old at the time of the entry; and that depended on the performance of duty by his parents, of which there was no evidence. The entry may have been rejected on that ground, just as legal records of baptisms, as above stated, are not evidence of the time of birth. If the ruling was made upon broader grounds, we do not see how it can be reconciled with the weight of English authority as shown by the cases already cited. See also 1 Stark. Ev. (4th Amer. ed.) 319–322; 1 Phil. Ev. (4th Amer. ed.) 356; 1 Taylor on Ev. (3d ed.) § 633.

In the United States, the law is well settled that an entry made by a person in the ordinary course of his business or

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vocation, with no interest to misrepresent, before any controversy or question has arisen, and in a book produced from the proper custody, is competent evidence, after his death, of the facts thus recorded. In a very early case the supreme court of Connecticut admitted the record of a baptism by a minister of a parish, who had since died, as evidence of the fact of baptism. *Huntly* v. *Compstock*, 2 Root, 99. It has been repeatedly held in this commonwealth that the book of a bank messenger or a notary public, kept in the usual course of business, though not required by law, is competent evidence after his death. *Welsh* v. *Barrett*, 15 Mass. 380. *Porter* v. *Judson*, 1 Gray, 175. Similar decisions have been made by the supreme court of the United States and by other American courts of authority. *Nicholls* v. *Webb*, 8 Wheat. 326. *Gale* v. *Norris*, 2 McLean, 471. *Augusta* v. *Winsor*, above cited. *Sheldon* v. *Benham*, 4 Hill, (N. Y.) 131. *Nourse* v. *McCay*, 2 Rawle, 70.

In the case before us, the book was kept by the deceased priest in the usual course of his office, and was produced from the custody of his successor; the entry is in his own handwriting, and appears to have been made contemporaneously with the performance of the rite, long before any controversy had arisen, with no inducement to misstate, and no interest except to perform his official duty. The addition of a memorandum that he had been paid a fee for the ceremony could not have added anything to the competency, the credibility, or the weight, of the record as evidence of the fact. An entry made in the performance of a religious duty is certainly of no less value than one made by a clerk, messenger or notary, an attorney or solicitor or a physician, in the course of his secular occupation.

*Exceptions overruled.*

*J. P. Converse*, for the defendant.

*A. R. Brown*, for the plaintiff.

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## Willard Drury & others *vs.* Inhabitants of Natick & another.

A testatrix by her will gave all her real and personal estate, after payment of debts and funeral expenses, to a town, for the purpose of establishing, for the use and benefit of all the inhabitants of the town, a free public library, and, if the funds should prove sufficient, a free public reading-room, to be under the control of trustees to be chosen by the inhabitants from time to time, which trustees were directed to sell certain of the real estate and empowered in their own names to convey the same, and were also directed to convert the personal estate into money and pay her debts and funeral expenses, and to appropriate the residue to the purposes above named by erecting a building, buying books and setting apart a fund for the future purchase of books and the establishment of a reading-room; and she provided that the town should forever pay all the incidental expenses of managing and insuring the library and building. The town at first voted to accept these provisions, and chose trustees accordingly; but afterwards reconsidered this vote, and voted to decline to accept the same. *Held*,

(1.) That the will gave the estate to the town in fee.

(2.) That it was the duty of an administrator with the will annexed to collect the personal assets and pay the debts and funeral expenses of the testatrix, and that the direction to the trustees to do these things was inoperative and void.

(3.) That the trustees were vested with a power, coupled with a trust, which entitled them to seek the instructions of this court as to the proper discharge of their duty.

(4.) That under Gen. Sts. *c.* 100, trustees for charitable trusts need not give bonds.

(5.) That the trusts created by this will were charitable trusts, although a burden was annexed to the acceptance thereof by the town.

(6.) That the town had power to accept the same; and after doing so cannot renounce the same.

7.) That the town, by accepting these provisions, could not bind itself to expend more money than is allowed by Gen. Sts. *c.* 33, § 9, for that purpose.

8.) That the charitable trusts will not be defeated nor the estate forfeited by a failure on the part of the town to pay the expenses put upon them by the will.

Bill in equity by trustees chosen by the town of Natick under the provisions of the will of Mary Ann Morse, seeking instructions as to their duty. The material portions of the will were as follows:

"I, Mary A. Morse, of Natick, in the county of Middlesex and Commonwealth of Massachusetts, single woman, . . . . . having a strong and abiding interest in the welfare and prosperity of my beloved native town, and being strongly desirous of promoting the same, do make, publish and declare this my last will and testament:

"First. I give and bequeath all real and personal estate, after

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payment of all my just debts and my funeral expenses, to the inhabitants of said town of Natick, for the purpose of founding and establishing a literary institute for the use and benefit of all the inhabitants of said town, under and according to the provisions and regulations hereinafter contained.

"Second. Said institute shall be named and called the Morse Institute, and its object and purpose shall be to promote and disseminate learning and intelligence among the inhabitants of said town by the means of a library, to be composed of the best standard works in the various departments of science and literature; and also by means of a reading-room, if the funds hereby created shall be found sufficient, and the trustees hereinafter named shall deem it advisable to establish the same.

"Third. A board of trustees, to consist of five persons, citizens of said town, and men of probity and learning, shall be chosen by the inhabitants of said town at the first annual town-meeting next after my decease, and at the annual meetings every fifth year thereafter, who shall hold office for the term of five years; and, in case a vacancy shall happen in said board by reason of the death of any of its members, or of their removal from said town, it shall be filled by election at the annual meeting next thereafter, and until said vacancy is filled the remaining members shall have and exercise all the powers of the full board. Said trustees are hereby fully empowered to sell and in their own names to convey all my real estate hereinafter directed to be sold, and they shall have exclusive control of the establishing and governing said institute as hereinafter provided. And until choice of said trustees as herein provided, the selectmen of said town for the time being shall have charge and custody of the estate hereby bequeathed, and shall take all measures necessary for the safe keeping and protection thereof.

"Fourth. Said trustees are directed, as soon after my decease as may be deemed expedient, to sell all my real estate excepting a lot of suitable dimensions for the location of the building hereinafter directed to be built for said institute, at the corner of Central and Washington Streets, being the spot on which my brick dwelling-house now stands, which shall be forever kept as

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a site for said institute; and also to convert all my personal estate, as soon as may be deemed expedient after my decease, into money, and thereout of to pay all my just debts and funeral expenses. Of the sum then remaining, the said trustees shall appropriate two thirds to the erection of said building, and the remaining third, with the exception of the sum of two thousand dollars, shall be appropriated by said trustees to purchasing books for said library. The sum of two thousand dollars before reserved shall be invested by said trustees, upon undoubted securities, as a permanent fund, and the interest arising therefrom shall be appropriated by said trustees from time to time for purchasing new and valuable books for said library, or a part thereof may be used, if said trustees shall deem it expedient so to do, for establishing a reading-room.

"Fifth. Said trustees, as soon as practicable, shall cause to be erected, on the site hereinbefore designated, a building for the use and purposes of said institute. [Here followed a description of the building.] Said trustees shall also purchase books for the library, having care always to select the best and most valuable works, as hereinbefore mentioned; they shall also appoint and remove the librarians, and make proper rules and regulations for the keeping and use of the library, making always sufficient provisions for the proper use and safe return of all books taken therefrom. And they may, if they shall deem it expedient so to do, appropriate a part of the interest of said sum of two thousand dollars for establishing a reading-room in said institute building, and make all needful rules and orders for the use of the same. They shall make quarterly examinations of the library, and also make annual reports to the town, of the condition of said institute and their doings in relation thereto.

"Sixth. Said library and reading-room shall be forever free for the use of all the inhabitants of said town, subject to such rules and regulations as said trustees may from time to time establish.

"Seventh. Said town of Natick shall forever pay all the expenses of the care of said library and reading-room, including the librarian's salary, and shall keep said building and grounds

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in good repair and order, and shall also keep said building and library insured against loss or damage by fire; and in case they shall be destroyed or damaged by fire, the money accruing from said insurance shall be appropriated for rebuilding, repairing and reëstablishing the same."

It appeared from the bill and answer that the will was admitted to probate in August 1862, and on the 6th of April 1863 the town of Natick voted to receive and accept the said bequest, and chose the plaintiffs as the five trustees to take care of the same, who accepted the trust; and on the 4th of April 1864 the town reconsidered said vote, and voted to decline to receive said bequest, and chose a committee of three to relinquish and release all their right, title and interest therein. The answer of the defendants averred, amongst other things, that the estate of the testatrix proved so small that it would not be beneficial to the town to accept the same, with the burdens imposed by the will. The defendants were the inhabitants of Natick and the heir at law of the testatrix.

The case was reserved by *Gray*, J., upon the bill and answer for the determination of the whole court.

*J. G. Abbott & J. W. Bacon*, (*G. B. Perry* with them,) for the plaintiffs. The will creates a gift to charitable uses. [The counsel cited some of the cases cited in the opinion.] The nature of the gift is not altered, even if it was upon a condition subsequent. The will does not create a trust in the town in its corporate capacity, but in the trustees. *Barrus* v. *Kirkland*, 8 Gray, 512. The *cestuis que trust* are the inhabitants, and not the town itself. *Green* v. *Putnam*, 8 Cush. 21. This court will regulate this charity. *Tainter* v. *Clark*, 5 Allen, 66, and cases there cited. The power of the town over the gift is carefully limited. The trustees have exclusive control of its management. By the vote of the town accepting the gift, the estate vested in the trustees as a trust, irrevocable by any vote of the town; and the town must perform the condition. 2 Story on Eq. § 1175, and cases there cited. *Harvard College* v. *Society for Theological Education*, 3 Gray, 280, and cases there cited. *Attorney General* v *Catherine Hall*, Jacob, 392 *Man* v. *Ballet*, Ib. 43. *Attorney*

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*General* v. *Gleg*, 1 Atk. 356. The town has authority to receive, hold and manage the gift. Gen. Sts. *c.* 18, § 9; *c.* 33, §§ 8, 9. *Nourse* v. *Merriam*, 8 Cush. 11, 19. *Cushing* v *Newburyport*, 10 Met. 508. The condition, if impossible of performance or repugnant to the grant, is void. The gift being to a charitable use, no perversion of the trust, or resignation, or refusal to act or removal of the trustees, will give any rights to the heir at law; but this court will see that the fund is properly applied. *Bliss* v. *Amer. Bible Soc.* 2 Allen, 334. *Winslow* v. *Cummings*, 3 Cush. 358. *Sanderson* v. *White*, 18 Pick. 339. Whether the fee passed to the trustees or not, they may apply to the court for instructions. *Howland* v. *Howland*, 11 Gray, 469. *Treadwell* v. *Cordis*, 5 Gray, 348. *Hooper* v. *Hooper*, 9 Cush. 126.

*H. W. Paine & T. H. Sweetser*, for the defendants. The estate vested in the town, under the will. It was at no time in abeyance, but vested immediately. The direction for the choice of trustees, and the powers given to them, did not divest the town of the estate. There is another reason why the estate did not vest in the trustees; and that is, that they were not exempt from giving bonds. Gen. Sts. *c.* 100, §§ 1, 4. *Newcomb* v. *Williams*, 9 Met. 535. The trustees, therefore, have no right to apply to the court for instructions. They have no vested interest in the gift. Nobody else desires to litigate. The two defending parties are in accord. The reconsideration by the town of the vote to accept the gift and the vote to decline it were equivalent to an original refusal to accept it. There had been no intervening action affecting the rights of anybody. *Hunneman* v. *Grafton*, 10 Met. 457. *Withington* v. *Harvard*, 8 Cush. 66. It is well settled that towns may reconsider any vote they have passed, if the rights of third persons are not affected. Here the town accepted a gift coupled with a burden. Will this court compel the town to go on and maintain this literary institute, and to administer a trust which it has never commenced to administer? The testatrix did not intend to have the town accept the gift, unless it also assumed the burden; and the town must be the sole judge of the propriety of assuming the burden. The court will not put this expense upon her estate. And as the town will

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not assume the burden, the intent of the testatrix cannot be substantially carried out. If this is a charity, it is true that the court may find somebody to execute it if the town will not. But is this a charity? Its purpose is charitable. But can that be a charity which is coupled with an expensive duty? Suppose that money is given to found a hospital, which the donee is to maintain. And see *Sanderson* v. *White*, 18 Pick. 333.

Gray, J. 1. The will of Miss Morse, though somewhat confused in language, and containing some inconsistent provisions, sufficiently manifests her intention to give her whole estate, real and personal, after payment of debts and funeral expenses, to the town of Natick in fee. This appears by the express words of the original gift "to the inhabitants of said town of Natick," as well as by the directions that, until the choice of trustees as provided in the will, the selectmen of the town shall have the charge and custody of the estate, and that the town shall pay the expenses of the library and reading-room, when established, and keep the building and grounds in repair, and the building and library insured. Any other construction would leave the fee of the real estate, until the election of the trustees, in the heirs at law, in direct contradiction of the first words of gift; and would require a transfer of the title to the trustees, when appointed, in the absence of any express words to that effect, or of any necessity for such an inference, to enable the trustees to perform all the duties imposed upon them by the will.

2. Upon the probate of the will (in which no executor was named) and the appointment of an administrator with the will annexed, the personal property vested in him by relation from the death of the testatrix, and it became his duty to collect the assets and pay therewith her funeral expenses and debts. The clause in the will, which directs the trustees to convert the personal estate into money as soon as might be deemed convenient, and out of the proceeds to pay debts and funeral expenses, was inconsistent with the duty imposed by law upon the administrator, and was therefore inoperative and void.

3. The duties of the trustees under the will are to establish and govern the institute; to sell and convey all the real estate

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not needed for its site; to apply part of the property to the erection of a building, and the residue to the purchase of books and the creation of a permanent fund for keeping up a library, and, at their discretion, establishing a reading-room; to purchase books, appoint and remove librarians, regulate the use of the library, examine it quarterly, and make annual reports to the town. Some of the powers of general superintendence and control, thus conferred, would seem to make the trustees visitors of the charity, although not so called in the will; for the question whether they are visitors depends on the nature of the powers delegated to them by the founder of the charity, rather than on the name by which they are called in the instrument of foundation; and no technical or precise form of words is necessary for the appointment of either general or special visitors. *Sanderson* v. *White*, 18 Pick. 338. *District Attorney* v. *Cushing*, 2 Cush. 530, 531. *Allen* v. *McKeen*, 1 Sumner, 301. Tudor on Charitable Trusts, (2d ed.) 119–121, and cases cited. But it is unnecessary in this case to consider whether the testatrix has made the trustees visitors, general or special. It is clear that the power to sell and convey real estate, and to apply the proceeds of this, and the personal estate remaining after payment of the debts and funeral expenses, to the erection of a building and establishment of a library, and, if the trustees should see fit, a reading-room, is not a mere naked power, but a power coupled with a trust. *Greenough* v. *Welles*, 10 Cush. 576, 578. *Leeds* v. *Wakefield*, 10 Gray, 517, 518.

4. This court has jurisdiction in equity of all suits and proceedings for enforcing and regulating the execution of trusts, whether relating to real or to personal estate. Gen. Sts. *c.* 113, § 2. This jurisdiction has been repeatedly exercised in suits brought for the instructions of the court by trustees having the legal title. *Treadwell* v. *Cordis*, 5 Gray, 348. But it is not limited to such cases. The fact that the plaintiffs have not the legal estate does not make them the less trustees, or simplify the questions arising in the performance of their trust, or oblige them to assume the risk of deciding those questions for themselves.

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5. The provisions of the Rev. Sts. *c.* 69, requiring trustees under a will to give bond to the judge of probate before entering on the duties of their trust, were held by this court to be confined to private trusts of limited duration, and not to extend to a public and permanent charity, the beneficiaries of which were indefinite, and a perpetual succession of trustees provided for in the will establishing it. *Lowell, appellant*, 22 Pick. 215. In the recent revision of that chapter, the words "for minors or others," in the first section, are omitted. Gen. Sts. *c.* 100, § 1. But in view of the other provisions of the chapter, which have been retained, and especially those of the same section, requiring a trustee to give bond to pay and deliver the estate in his hands at the expiration of his trust "to the person or persons entitled thereto," of the second section, exempting him from giving bond upon the consent of "all persons interested in the trust fund," and of the twelfth section, authorizing his bond to be put in suit "for the use and benefit of any person interested in the trust estate;" and upon referring to the former statutes, as was done in the case just cited, to aid the interpretation; we are of opinion that the legislature did not intend to alter the law in this respect and no such change was advised or suggested in the report of the commissioners. All the duties to be performed by the trustees under the will of Miss Morse relate to the establishment and management of the library and reading-room for the use of the inhabitants of the town. If this was a public charity, the trustees were not required to give bond.

6. A doubt was expressed by one of the learned counsel for the defendants whether this was a public charity. But the court can see no foundation for any doubt upon this subject.

The testatrix in the preamble of her will gives, as a reason for her gift, "having a strong and abiding interest in the welfare and prosperity of my beloved native town, and being strongly desirous of promoting the same." She then gives her estate to the town of Natick, "for the purpose of founding and establishing a literary institute, for the use and benefit of all the inhabitants of said town," with the "object and purpose to promote and disseminate learning and intelligence among the inhabitants

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of said town, by the means of a library, to be composed of the best standard works in the various departments of science and literature; and also by means of a reading-room, if the funds hereby created shall be found sufficient, and the trustees hereinafter named shall deem it advisable to establish the same;" and provides that "said library and reading-room shall be forever free for the use of all the inhabitants of said town, subject to such rules and regulations as said trustees may from time to time establish."

The *St.* of 43 Eliz. *c.* 4, in principle and substance, so far as it recognizes, defines or indicates what are charitable uses, is part of our common law. *Going* v. *Emery*, 16 Pick. 116. *Burbank* v. *Whitney*, 24 Pick. 152. *Earle* v. *Wood*, 8 Cush. 445. The objects named in that statute are contained in the preamble which recites that many gifts have been made, as well by the crown as by private persons, "some for relief of aged, impotent and poor people, some for maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars of universities, some for repair of bridges, ports, havens, causeways, churches, sea-banks and highways, some for education and preferment of orphans, some for or towards relief, stock or maintenance for houses of correction, some for marriages of poor maids, some for supportation, aid and help of young tradesmen, handicraftsmen and persons decayed, and others for relief or redemption of prisoners or captives, and for aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes." No one can read this sentence without perceiving its aim to have been to show by familiar examples what classes or kinds of uses were considered charitable, or so beneficial to the public as to be entitled to the same protection as strictly charitable uses, rather than to enumerate or specify all the purposes which would fall within the scope and intent of the statute, much less every possible mode of carrying them out. It is accordingly the well settled construction of this ancient act, both in England and America, that in determining what uses are charitable within the statute, courts are to be guided not by its letter, but by its manifest spirit and reason,



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and are to consider not what uses are within its words, but what are embraced in its meaning and purpose. There are no better illustrations of this than in the cases of gifts to towns and cities or for the promotion of education and useful knowledge.

The only public buildings or works named in the *St.* of 43 Eliz. are bridges, ports, havens, causeways, churches, sea-banks and houses of correction. Yet there are high authorities, English and American, in favor of holding any gift for the benefit of all the inhabitants of a town to be charitable. Lord Keeper Coventry, in declaring the charitable uses to which an estate held by the town of Warwick should be applied, included not only the repair of a church, binding out poor children as apprentices, relief of the poor, and repair of a bridge, but "such other religious, good and charitable uses tending to the general good of the town, and ease of the inhabitants thereof, as the bailiff and burgesses for the time being should think meet and convenient;" and in another case established, against the heirs at law, a devise of real estate to "be employed to and for such good uses of perpetuity within the city of Bristol" as by the mayor and aldermen of that city, with the consent of the donor's executors, should be thought fit and necessary. *Attorney General* v. *Burgesses of Warwick*, West Ch. 61; *S. C.* Dwight's Charity Cases, 142. *Mayor & Burgesses of Bristol* v. *Whitson*, Ib. 171; *S. C.* Duke, (Bridgman's ed.) 377. Lord Camden defined a charity as "a gift to a general public use, which extends to the poor as well as the rich;" and held a devise to bring water into a town for the use of the inhabitants forever, and make conduits and reservoirs, to be charitable. *Jones* v. *Williams*, Ambl. 651. This definition has been adopted by Chancellor Kent, and by the supreme court of the United States; and Chancellor Kent accordingly held a legacy to build a town-house for transacting town business to be a charitable bequest. *Coggeshall* v. *Pelton*, 7 Johns. Ch. 292. *Perin* v. *Carey*, 24 How. 506. Gifts for the improvement of a city have been repeatedly held to be charitable. *Howse* v. *Chapman*, 4 Ves. 542. *Gort* v *Attorney General*, 6 Dow, 136. *Attorney General* v. *Heelis*, 2 Sim. & Stu. 76, 77. *Mitford* v. *Reynolds*, 1 Phillips R. 191, 192

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*Attorney General* v. *Eastlake*, 11 Hare, 205. *Mayor, &c. of Faversham* v. *Ryder*, 18 Beav. 318; *S. C.* 5 De Gex, Macn. & Gord. 350. *American Academy* v. *Harvard College*, 12 Gray, 551. *Cresson's appeal*, 30 Penn. State R. 437.

Of the words "ports and havens," Sir Francis Moore, who penned the statute, whose exposition of it has rarely, if ever, been found too broad, and whose reading upon it was cited by Lord Eldon as of itself sufficient authority upon another point arising under this clause, says, "Common ponds, or watering places, are within the equity of these words." Duke, (Bridgman's ed.) 129. *Attorney General* v. *Brown*, 1 Swanst. 297, 307, 308; *S. C.* 1 Wils. Ch. 365, 386. It is perhaps worthy of notice in this connection that in another aspect the law of Massachusetts from the earliest times has regarded the rights of the public in great ponds as similar to their rights in the sea. Body of Liberties of 1641, art. 16. Anc. Chart. 148, 149. *Commonwealth* v. *Alger*, 7 Cush. 68. *West Roxbury* v. *Stoddard*, 7 Allen, 158.

The only modes of education, enumerated in the statute, are "schools of learning, free schools, and scholars in universities." But gifts for the promotion of science, learning and useful knowledge, by other means than schools or colleges, or direct instruction of pupils or students, are equally public and charitable. Such are held in the English courts of chancery to be gifts to establish a perpetual botanic garden, for the public benefit; *Townley* v. *Bedwell*, 6 Ves. 194; or a museum for the collection and preservation of objects of science and art, for the public improvement; *British Museum* v. *White*, 2 Sim. & Stu. 594; or an institution for the study and cure of diseases of animals useful o man, and maintaining free lectures thereon. *London University* v. *Yarrow*, 23 Beav. 159; *S. C.* 1 De Gex & Jones, 72. The Smithsonian Institution at Washington owes its existence to a bequest to found "an establishment for the increase and diffusion of knowledge among men," which Lord Langdale held to be a valid charity. *President of United States* v. *Drummond*, cited in 7 H. L. Cas. 155. U. S. Sts. 1836, *c.* 252; 1846, *c.* 178. And "the benefit and advancement and propagation of

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education and learning in every part of the world, as far as circumstances will permit," has been recently held by the highest judicial authorities in England to be a good charitable use. *Whicker* v. *Hume*, 14 Beav. 509; *S. C.* 1 De Gex, Macn. & Gord. 506; 7 H. L. Cas. 124. But the gift must be expressly or by necessary implication for the public benefit. Therefore a private museum, or a library established by private subscription for the use of the subscribers, has been held not to be a charity. *Thomson* v. *Shakespeare*, H. R. V. Johns. 616; *S. C.* 1 De Gex, Fisher & Jones, 406, 408. *Carne* v. *Long*, 2 De Gex, Fisher & Jones, 79.

The general court of the Colony did not suffer the law of Massachusetts to rest merely on the law of England, but in 1671 passed a statute, by which they enacted that all gifts and legacies "to the college, schools of learning, or any other public use," should be disposed of "according to the true and declared intention of the donors," and authorized the county courts to appoint trustees and to compel them to render accounts of their disposal and management thereof. 4 Mass. Col. Rec. pt. ii. 488. The general court at that time sometimes exercised a kind of chancery power; and their attention had been called to the subject of charitable uses in a case decided by them the year previous, in which they recognized a free school established in Roxbury by voluntary contribution of the inhabitants "out of a religious care of their posterity and their education in good literature" as "a good and pious" and "charitable work," ratified the agreement under which it had been established, and made the feoffees "responsible to the court of assistants and the donors for the faithful discharge of their trust." Ib. 457, 458. Jurisdiction over charities was exercised under the Colonial Statute of 1671 by the county courts, and, after the repeal of the Colony Charter in 1685, by the president or governor and council. *Hadley* v. *Hopkins Academy*, 14 Pick. 246, 263–265. Washburn's Judicial Hist. Mass. 28, 34, 98. Mass. Col. St. 1685, 5 Mass. Col. Rec. 477. Under the Province Charter, the king disallowed all acts continuing in force the colonial laws or establishing courts of chancery; the general court seem to

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have acted in the matter of charities by resolves or acts of incorporation only, and jurisdiction in equity over trusts was first conferred on this court by *St.* 1817, *c.* 87; but the want of chancery jurisdiction did not affect the validity of charitable bequests when sufficient in form. *Bartlet* v. *King*, 12 Mass. 544, 545. 4 Dane Ab. 243. 9 Gray, 518. Quincy, 538, *n.* and authorities cited. *Vidal* v. *Girard*, 2 How. 196.

The Constitution of the Commonwealth declares that "the encouragement of arts and sciences and all good literature tends to the honor of God, the advantage of the Christian religion, and the great benefit of this and the other United States of America," and that wisdom and knowledge, as well as virtue, diffused generally among the body of the people, are necessary for the preservation of their rights and liberties; and therefore makes it the duty of all legislatures and magistrates to cherish the interests of literature and the sciences, and encourage private societies and public institutions for their promotion. Const. of Mass. *c.* 5, § 1, art. 1; § 2.

Charities for the promotion of education and learning have not been confined in this commonwealth within the words of the statute of Elizabeth. Chief Justice Shaw, in the case of *Count Rumford's Legacy*, said, "That a gift designed to promote the public good, by the encouragement of learning, science and the useful arts, without any particular reference to the poor, is regarded as a charity, is settled by a series of judicial decisions, and regarded as the settled practice of a court of equity;" and held that a gift in trust to pay the income in rewards for discoveries and improvements on light and heat, most useful to mankind, was charitable. *American Academy* v. *Harvard College*, 12 Gray, 551. In the case of the *Lowell Institute*, a bequest to provide for the delivery of public lectures in the city of Boston, upon philosophy, natural history and the arts and sciences, for the promotion of the moral, intellectual and physical instruction and education of the inhabitants of the city, was held to be a charity. *Lowell, appellant*, 22 Pick. 215. And in *Northampton* v. *Smith*, 11 Met. 390, the court recognized the validity of a bequest, payable at a future day, to a town, to establish model and

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experimental farms to promote the knowledge of the art and science of agriculture. The apparently inconsistent statement of Chief Justice Shaw in *Sanderson* v. *White*, 18 Pick. 333, that since the passage of the *St.* of 43 Eliz. "all gifts are to be deemed charitable which are enumerated in that statute as such, and none other," is shown by referring to the case of *Morice* v. *Bishop of Durham*, which he cites in its support, to have omitted, either by accident, or as immaterial to the case then under consideration, the words added by Sir William Grant, and in substance repeated by Lord Eldon, in that case, "or which by analogies are deemed within its spirit and intendment." 9 Ves. 405. 10 Ves. 541. See also *Sohier* v. *St. Paul's Church*, 12 Met. 250; *Earle* v. *Wood*, 8 Cush. 445, and cases cited.

This gift to the town of Natick to establish a library for the use of all the inhabitants was therefore clearly a public charity.

7. The capacity of a city or town to take and hold devises and bequests for appropriate charitable uses is perfectly well settled. *Vidal* v. *Girard*, 2 How. 190. *Perin* v. *Carey*, 24 How. 505. *White* v. *South Parish in Braintree*, 13 Met. 506. *Nourse* v. *Merriam*, 8 Cush. 19. *Webb* v. *Neal*, 5 Allen, 575. Indeed, the statutes of the Commonwealth in terms authorize towns to hold real and personal estate "for the public use of the inhabtants," or "in trust for the support of schools and for the promotion of education within the limits of the town;" and "to receive, hold and manage any devise, bequest or donation, for the establishment, increase or maintenance, of a public library within the same." Gen. Sts. *c.* 18, § 9; *c.* 33, § 9.

8. The devise and bequest to the town of Natick vested in the town from the death of the testatrix, subject to be renounced by the town within a reasonable time and before manifesting an intention to accept it. *Townson* v. *Tickell*, 3 B. & Ald. 31. *Doe* v. *Smyth*, 9 D. & R. 136; *S. C.* 6 B. & C. 112. *Ex parte Fuller*, 2 Story R. 330. The town in April 1863, at a meeting duly called for the purpose, voted to accept and receive this gift, and chose trustees to take charge of it according to the will. Upon such acceptance, the power to renounce the gift

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ceased, and the estate could not pass from the town without a conveyance in due form of law.

Besides; the gift being for a charitable purpose, and once accepted, could not afterwards be renounced or conveyed away, so as to defeat the charity. *American Academy* v. *Harvard College*, 12 Gray, 551. *Harvard College* v. *Society for Theological Education*, 3 Gray, 280. *Attorney General* v. *Christ's Hospital*, 1 Russ. & Myl. 626; *S. C.* Tamlyn, 393. *Attorney General* v. *Caius College*, 2 Keen, 163.

9. The town could not by such acceptance bind itself to appropriate money to the support of the charity beyond the limit prescribed by the statute, which provides that towns may "appropriate money annually for the maintenance or increase of a public library a sum not exceeding fifty cents for each of its ratable polls in the year next preceding that in which such appropriation is made." Gen. Sts. *c.* 33, § 9. It is unnecessary, for the decision of this case, to consider whether the town can, by accepting a charitable gift for such a purpose, bind itself in advance to appropriate money to its support, or whether the sum to be so voted must be determined by annual vote of the inhabitants from time to time. It is not to be presumed that the town will fail to carry out, to the extent of its legal powers, the wishes of its benefactress.

10. The provision in the will for the payment by the town forever of all expenses of this charity and of repairing and insuring the building and library, even if subject to the vote of the town from time to time, does not invalidate the gift, nor forfeit the estate upon non-compliance with this provision, nor enable the town to renounce the gift at pleasure, after having once accepted it. This provision is not in the form of a condition, but of a direction. If it were in the strictest form of a condition, then so far as it undertook to impose obligations upon the town for the future, which it could not by law assume, it would be repugnant to the grant and void. *Nourse* v. *Merriam*, 8 Cush. 11. *Attorney General* v. *Greenhill*, 33 Beav. 193. 2 Bl. Com. 156.

We have thus disposed of all the questions concerning which

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instructions have been asked by the plaintiffs. A final decree may be entered for the establishment of the charity, with liberty reserved to the trustees to apply to the court hereafter for further directions. *Decree accordingly.*

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## CRIMINAL CASES.

### COMMONWEALTH *vs.* NORMAN F. EDGERLY.

In support of an indictment for having counterfeit bank bills, with intent to pass them, knowing them to be false, evidence is competent of previous declarations of the defendant showing that he was then engaged in the business of passing counterfeit money; but the contents of a letter, containing counterfeit money, received by him at the post-office and immediately taken from his possession before he had opened it, cannot be proved.

If the presiding judge, after admitting an incompetent letter, the contents of which are of a nature to prejudice the defendant in an indictment, to be read to the jury, reconsiders his ruling and instructs them to disregard it, but finally allows it to go with the other papers to the jury, against the defendant's objection, a new trial should be granted.

INDICTMENT under Gen. Sts. *c.* 162, § 8, against the defendant for having a counterfeit bank bill in his possession with intent to pass the same, knowing it to be counterfeit.

At the trial in the superior court, before *Rockwell*, J., Nehemiah Flanders, city marshal of Newburyport, testified that in September he saw the clerk at the post-office pass out some letters to the defendant, and that immediately afterwards he arrested him; that he took the letters from the defendant's possession after bringing him to the station house, and found them to be directed to him; that upon the defendant's refusal to open them he himself opened one of them; that there was a letter within the envelope and several bank bills, one of which was described in the indictment. The defendant objected to the admission of the contents of the envelope in evidence, but the judge allowed them to be read to the jury. Two witnesses testified that the bill described in the indictment was a counterfeit almost exactly resembling the genuine bills of the Bank of

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Commerce; and that the other bills were counterfeit, excepting one, which was a genuine bill on a broken bank.

Benjamin Austin, a witness for the Commonwealth, testified, under objection, that in the preceding June he met the defendant; "he asked me if I did not want to go away with him, to see if we could not make some money. I asked him how. He showed me a large roll of bills which he said were 'bogus.' I told him it was rather too risky business for me, and I guessed I would not trouble it. He cautioned me to say nothing about it. In a few days I saw him again. He wanted me to go down the river with him. I told him I had no money, and besides could not leave my work. He said that was no matter, and took out three or four dollars in fractional currency and gave them to me. It was bran new. We found we could not get a boat that afternoon, and I offered it back to him. He told me to keep it, and I did so. I disposed of it, and some days afterwards he asked me if I had disposed of it. I told him yes, and he laughed. I asked him if it was not good, and he said, Yes, it was good, if I had got rid of it. At one of these last two interviews he said he had disposed of some of the money he had showed me; that he had been to Ipswich, and made a good haul."

The defendant, among other things, requested the judge to rule that "there was no evidence in the case from which the jury can find a guilty knowledge in regard to this bill;" but the judge ruled, among other things, that "the evidence tending to show that previous to these transactions the defendant had other counterfeit money in his possession, knowing it to be counterfeit, with intent to pass the same, is competent for the consideration of the jury; but the contents of the letter are not evidence for the consideration of the jury in this case."

The letter, besides having been read by Flanders, as before stated, was also read to the jury by the district attorney in his closing argument. After the ruling excluding it from their consideration had been announced in the charge, the district attorney asked that it might be allowed to go to the jury with the other papers in the case The defendant objected, but the

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judge allowed it to go, repeating the instruction that it was not evidence for the consideration of the jury, and was not to be read by them.

The jury returned a verdict of guilty, and the defendant alleged exceptions.

*S. B. Ives, Jr.*, for the defendant, cited *Fairlie* v. *Denton*, 3 C. & P. 103; *Rex* v. *Plumer*, Russ. & Ry. 264; *Alger* v. *Thompson*, 1 Allen, 453; *Farnum* v. *Farnum*, 13 Gray, 508; *Commonwealth* v. *Stone*, 4 Met. 43; *Commonwealth* v. *Stearns*, 10 Met. 256; *Rex* v. *Ball*, 1 Camp. 324; *Rex* v. *Smith*, 4 C. & P. 411; *Commonwealth* v. *Bigelow*, 8 Met. 235.

*Reed*, A. G., for the Commonwealth, besides some of the cases cited by the defendant, cited *People* v. *Green*, 1 Parker's Crim. Cas. 11; *Commonwealth* v. *Turner*, 3 Met. 19; *Finn* v. *Commonwealth*, 5 Rand. (Va.) 701; *Reed* v. *The State*, 15 Ohio, 217.

Bigelow, C. J. The conversations of the defendant with Austin were clearly competent and relevant to the issue. One of the material points, which it was necessary for the prosecution to make out, was the guilty knowledge of the defendant respecting the bills found in his possession. This is sometimes shown by evidence that the defendant has recently had other counterfeit money than that which is the subject of the indictment in his possession, and has offered to pass the same as true. Such testimony is deemed to be admissible, although it may relate to a different kind of money from that which is described in the indictment; and it is held to be relevant, although several weeks and even months may have elapsed since such previous possession or attempt to pass. *Rex* v. *Balls*, 1 Moody, C. C. 470. *Regina* v. *Nisbett*, 6 Cox, C. C. 320. Evidence of this kind, however, is not deemed to be competent unless the particular bill or note to which it relates is produced at the trial, or sufficient reason is shown for its non-production. *Commonwealth* v *Bigelow*, 8 Met. 235. If the evidence offered at the trial had been of this precise character, that is, if the testimony of Austin had been introduced for the purpose of proving that on a previous occasion the defendant had attempted to pass as true

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certain bills or notes which were false or counterfeit, it could not properly have been admitted without the production of the bills or notes, or satisfactory evidence to account for their non-production. But the testimony admitted at the trial did not tend to establish such fact. It did not show that the defendant had attempted to pass other bills than those set out in the indictment as genuine which were in fact false, or that he had them in his possession for that purpose. But it did prove an admission or confession that he was a dealer in counterfeit money, and had attempted to dispose of it as such to the witness. It cannot be doubted that a direct statement by the defendant, made previous to the transaction which forms the subject of the indictment, that he was accustomed to buy and sell counterfeit money and was familiar with different kinds of forged notes or bills, would have been admissible as tending to prove the guilty knowledge of the defendant. The testimony introduced at the trial was in effect of this character, and it was competent as a confession or admission having a material bearing on one of the issues before the jury, without the aid of extrinsic facts to render it admissible.

The letter which the defendant took from the post-office was clearly incompetent. It was in the hands of the defendant during a very brief period of time, and he neither opened nor read it. An unanswered letter is inadmissible, although the statements contained in it are well known to the party to whom it was sent; and this is held on the ground that a letter written to a party by a third person, to which no reply is made, does not show an acquiescence in the facts stated in the letter. *Fearing* v. *Kimball*, 4 Allen, 125, 128. *A fortiori*, a letter addressed to a person which he has not read cannot be admitted to affect him in any way. The mistake of the judge was that he permitted the letter to go to the jury after he had ruled that it was inadmissible as evidence. This was clearly irregular, but it would be an immaterial error if the contents of the letter were unimportant; but on looking at them it is clear that they were of a nature to prejudice the minds of the jury against the defendant, and to lead them to a belief that he was guilty of the crime

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charged in the indictment. Then the only question is, whether the defendant's rights were sufficiently guarded by the direction of the judge that the letter was not evidence for the consideration of the jury, and was not to be read by them. And we are of opinion that they were not. The ruling was contradictory. If the letter was incompetent, it could not properly go to the jury; but it being sent to them with the other documents in the case, it was in fact treated as a paper which was properly before them for consideration. In this conflict between the language and the action of the court, it is impossible to say that the jury might not have been so confused and misled as to have given some heed to the contents of the letter. When verbal testimony has been admitted in the course of a trial and subsequently on reconsideration ruled out, it is reasonable to suppose that the jury will follow the instructions of the court and give no weight to evidence which is withdrawn from their consideration, and which they are told to disregard. *Tapley* v. *Forbes*, 2 Allen, 26. But in such a case a verdict will be set aside unless it is certain that there could have been no misapprehension or mistake in the minds of the jury. *Farnum* v. *Farnum*, 13 Gray, 508. There can be no such certainty when a written document is permitted to go to the jury room after it has been rejected by the court. Upon this ground, we are of opinion that the verdict rendered against the defendant must be set aside.

Some of the court are inclined to the opinion that the evidence offered at the trial was insufficient to warrant a verdict of guilty. But as the aspect of the evidence may be essentially changed upon another trial, it is unnecessary to express a decided opinion on this point. *Exceptions sustained.*

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## Commonwealth *vs.* Fitchburg Railroad Company.

An indictment to recover a penalty imposed by statute need not negative the existence of circumstances which, under a proviso contained in the statute, would exonerate the defendant from liability.

This court cannot rule as a matter of law that a verdict should be set aside, the finding of which depends not only upon the finding of the jury upon several distinct facts, but also upon inferences to be drawn from them, if upon each of these facts there is sufficient evidence to make it a proper matter to be submitted to the jury.

Indictment under Gen. Sts. *c.* 63, § 98, against a railroad corporation for running over and killing Benjamin F. Hapgood, through the gross carelessness of their servants. The indictment contained no averment that Hapgood was not upon the railroad contrary to law or the reasonable rules and regulations of the corporation;* and the defendants moved to quash the indictment for this reason, but the motion was overruled.

At the trial in the superior court, before *Morton*, J., evidence was introduced, which, so far as is now material, is stated in the opinion, and which the defendants contended was insufficient to show due care upon the part of Hapgood, or gross negligence upon the part of their servants, and they requested the court so to rule; but the case was submitted to the jury, who returned a verdict of guilty. The defendants alleged exceptions.

*J. Q. A. Griffin & G. M. Brooks*, for the defendants, cited *Meesel* v. *Lynn & Boston Railroad*, 8 Allen, 234, and cases cited; *Warren* v. *Fitchburg Railroad*, Ib. 227, and cases cited; *Denny* v. *Williams*, 5 Allen, 1, and cases cited.

*Reed*, A. G., for the Commonwealth.

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* Gen. Sts. *c.* 63, § 98, impose a penalty upon a railroad corporation, to be recovered by indictment, if by reason of its negligence or carelessness, or the unfitness or gross negligence or carelessness of its servants or agents while engaged in its business, the life of any person, being in the exercise of due diligence, and not being a passenger or in the employment of the corporation, is lost; "*provided*, that the corporation shall not be so liable for the loss of life by any person while walking or being upon its road contrary to law or the reasonable rules and regulations of the corporation."

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CHAPMAN, J.* 1. The defendants contend that the first count in the indictment is bad, because it does not allege that Hapgood was not at the time he lost his life walking or being on the defendant's road contrary to law or the reasonable rules and regulations of the corporation. The clause of the statute, Gen. Sts. *c.* 63, § 98, on which this objection is founded is contained in a proviso, and not in the enacting part of the section; and upon the authority of *Commonwealth* v. *Hart*, 11 Cush. 130, the allegation was properly omitted. This being the only objection now insisted upon, and the other objections stated in the motion to quash not appearing to be well founded, the indictment must be held good.

2. Upon a careful consideration of all the evidence as reported, the court cannot see judicially that the evidence was insufficient in law to sustain the verdict.

There was evidence tending to show that the bell was not rung or the whistle sounded, in conformity with *St.* 1862, *c.* 81. That statute requires that the engine shall have a bell of at least thirty-five pounds in weight, and a steam whistle; that the bell shall be rung or the whistle sounded at least eighty rods from the crossing; and the bell shall be rung or the whistle sounded, either one or the other, continuously or alternately until the engine has crossed the way. The weight of all the evidence on this point is apparently in favor of the defendants, but there was so much evidence against them that the presiding judge properly submitted it to the jury, and if the finding was erroneous, the only remedy of the defendants was by a motion for a new trial.

If the jury were satisfied that the bell was not rung nor the whistle sounded, they would of course find that the defendants' servants were guilty of negligence; and it was for them, and not for the court, to determine the degree of that negligence, in view of all the facts that appeared in evidence Ordinarily they would be justified in finding that such an omission was gross negligence.

* HOAR, J. did not sit in this case.

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The purpose of ringing the bell and sounding the whistle is to give notice to persons travelling on the highway of the approach of the train. Travellers have a right to presume that this notice will be given, and that the statute will be complied with, and a reliance on this presumption cannot be regarded as carelessness. To what extent it is safe or reasonable to rely upon their ability to hear the bell or the whistle is a question of fact to be submitted to the jury.

If the evidence made it certain that Hapgood or his companion saw the train approaching in season to avoid a collision, and yet persisted in passing just before it, the court might determine that their conduct was careless. For the train has the superior right, and travellers in other vehicles must yield to it, though they are on the highway. This is a necessary rule, resulting from the different species of conveyance used on the railroad and on the highway. The engine is an instrument of such power, and runs with such speed, and the train acquires such momentum, that it cannot be stopped immediately; nor can its speed be checked too suddenly without great danger to the train and to the persons on board. On the other hand, the conveyances used on highways are controlled and stopped with comparative ease.

Or if the evidence made it certain that Hapgood or his companion might have seen the approaching train in season to avoid a collision by the use of ordinary care, the court might determine that they were careless. For it is the duty of travellers to make a reasonable use of their senses, even if the managers of the train neglect to ring the bell or sound the whistle.

But the evidence does not so clearly establish the fact that these persons saw the train or might have seen it in season to avoid the collision, as to authorize the court to interfere. As they approached the crossing from a distance they would be unable to see the train for a considerable part of the way. There were several points where it would have been in view, if it had been in certain positions while they were passing those points. But it does not appear precisely where the train was when they passed those points, so that it is not certain that they

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saw it or were careless in not seeing it before they came upon the crossing. Nor does it appear that they heard or were careless in not hearing the ordinary noise made by it, aside from the ringing of the bell or sounding of the whistle. The road-bed appears to have been excavated, so that as they approached the crossing a bank would intervene between them and the train. As they entered the excavation and came near the track the train would be in sight; but the crossing is so nearly at right angles that they must have turned their heads considerably to see it. The question here arose whether they were careless in not turning to see it; and also whether it was an act of carelessness to strike the horse and endeavor to cross before the train, when it was so near to them; but these were questions of fact which must be decided in view of all the circumstances. The court cannot determine precisely where the train was when they saw it or ought to have seen it, nor precisely how near to the track they then were, nor whether they were so absorbed in conversation as not to notice what they ought to have noticed. The question of their negligence depends not only upon a considerable number of distinct facts, but upon inferences to be drawn from those facts, and thus the whole matter was clearly within the province of the jury.

In all the cases cited by the defendants' counsel in which the court has taken the decision into its own hands, the evidence has been deemed legally insufficient to prove the plaintiff's case, or some essential point in it. In all other cases, questions of fact are within the province of the jury, and in every case the court has carefully abstained from invading their province. Its power is always exercised with a proper regard to the distinction between the province of the court and the province of the jury. In *Toomey* v. *London, &c. Railway*, 3 C. B. (N. S.) 146, which was an action for negligence, Williams, J. remarked, "It is not enough to say there was *some* evidence; for every person who has had experience in courts of justice knows very well that a case of this sort against a railway company could only be submitted to a jury with one result. A *scintilla* of evidence, or a mere surmise that there may have been negligence on the part

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of the defendants clearly would not justify the judge in leaving the case to the jury; there must be evidence upon which they might reasonably and properly conclude that there was negligence." The same doctrine has been held in this court in *Denny* v. *Williams*, 5 Allen, 1. We trust the rights of companies are safer in the hands of juries in this commonwealth than the learned judge represents them to be in England; but if it were otherwise, the only power which the court could properly exercise on that account would be the increase of vigilance. If juries are unfaithful, the public must submit to the misfortune or must provide its own remedy. In the present case, however there was more than a mere *scintilla* of evidence against the defendants, and we think the presiding judge could not properly have refused to submit it to the jury.

*Exceptions and motion to quash overruled.*

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COMMONWEALTH *vs.* JAMES MCGOVERN.

Under *St.* 1864, *c.* 250, §§ 2, 3, the decision of a judge of the superior court overruling a motion, made before the jury are sworn, to quash an indictment, is subject to exception.

An indictment, under *St.* 1863, *c.* 252, against a person for enticing and soliciting another to leave this commonwealth, for the purpose of enlisting in the military service of the United States elsewhere, need not allege that the person enticed did leave, or was a citizen of, or liable to do military duty in, this commonwealth, or set forth the particular means used to entice or solicit such person.

The *St.* of 1863, *c.* 252, is not repealed by U. S. St. of 1865, *c.* 79.

INDICTMENT, found in Suffolk county, for enticing and soliciting a person to leave this commonwealth for the purpose of enlisting in the military service of the United States elsewhere.

At the trial in the superior court, before *Putnam*, J., the defendant's counsel filed a motion, before the jury were sworn, to quash the indictment, because it did not allege that the person enticed did leave, or was a citizen of, or liable to do military duty in, this commonwealth. The judge overruled the motion. The defendant then withdrew his plea of not guilty and entered a plea of guilty, and alleged exceptions.



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*A. O. Brewster & F. F. Heard*, for the defendant.

*Reed*, A. G., for the Commonwealth.

GRAY, J. This case comes before us upon exceptions to the overruling by the superior court of a motion to quash the indictment, for reasons specified in the motion. The attorney general objects that this decision was final, and not subject to exception; and the first question to be determined is, whether this objection is well founded.

At common law, it was certainly within the discretion of the judge presiding at a criminal trial, either to quash a defective indictment on motion, or to leave the defendant to demur to the indictment, or move in arrest of judgment. 2 Hawk. *c.* 25, § 146. *Rex* v. *Wheatly*, 2 Burr. 1127. *Commonwealth* v. *Gould*, 12 Gray, 173, and cases cited. *State* v. *Putnam*, 38 Maine, 297. But a demurrer to the indictment confesses the facts charged, and if it is overruled, judgment is to be rendered and sentence awarded against the defendant, at least in cases of misdemeanors, unless the court before which the trial is had sees fit to allow him to withdraw his demurrer and plead to the indictment. 2 Hawk. *c.* 31, §§ 5–7. 2 Gabbett Crim. L. 325, 326. *Evans* v. *Commonwealth*, 3 Met. 456, 457. *People* v. *Taylor*, 3 Denio, 98. *State* v. *Merrill*, 37 Maine, 333. *Regina* v. *Faderman*, 4 Cox C. C. 359. The usual manner, therefore, of raising objections to the sufficiency of an indictment, before the *St.* of 1864, *c.* 250, took effect, was by motion in arrest of judgment after conviction by the jury; and to the overruling of such a motion exceptions would lie.

But that statute peremptorily requires that any objection to an indictment for a formal defect apparent upon its face shall be taken by demurrer or motion to quash, and not by motion in arrest of judgment, unless for a cause affecting the jurisdiction of the court. *St.* 1864, *c.* 250, §§ 2, 3. It therefore is no longer within the discretion of the court to refuse to hear a legal objection upon a motion to quash; and if heard, it must be decided according to fixed rules of law. Upon the construction for which the attorney general contends, the defendant could not escape from an erroneous ruling against him in matter of law

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by the court below, without abandoning all defence on the facts; for if he should raise a legal objection by motion to quash, it is said that no exception would lie; and if he should raise it by demurrer, he would have no right to plead over without leave of the judge. The Declaration of Rights requires that no subject shall be held to answer for any crime or offence, until the same is fully and plainly, substantially and formally, described to him; and we cannot infer that the legislature, by this statute, which is entitled "an act to promote public justice in criminal cases," intended to oblige the accused either to leave the question whether this requirement of the Constitution has been complied with to the sudden and final determination of a single judge in the course of the trial, or else to waive his right of trial by jury. The manifest purpose of this statute was to require formal objections to be taken before putting the Commonwealth to the trouble and expense of a trial on the facts, not to embarrass or take away the right of the defendant to obtain the opinion of the highest court upon any such objection.

The questions raised by the motion to quash the indictment are therefore before us for decision. But none of the grounds suggested by the defendant are sufficient to sustain the motion.

1. Whether the person enticed did leave the Commonwealth was immaterial. It is the act of enticing or soliciting him to do so, for the purpose of entering upon and enlisting in military service in another state, which the *St.* of 1863, *c.* 252, makes criminal, without regard to the fact whether that purpose is carried out or not. *Commonwealth* v. *Jacobs*, 9 Allen, 274.

2. Nor was it necessary to allege that he was a citizen of the Commonwealth. A person not a citizen, even an alien, although he could not perhaps be compelled to enlist, might have voluntarily enlisted here in the military service; and therefore comes within the reason, as well as the express words, of the statute of 1863, which makes it criminal to entice or solicit "any person" to leave the Commonwealth for the prohibited purpose. *United States* v. *Wyngall*, 5 Hill, 16. *Commonwealth* v. *Jacobs*, above cited.

3. The act of enticing or soliciting consists of a variety of

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acts and circumstances, all originating in the same purpose, and is itself a fact, which admits of no precise or definite description; and the particular means used need not, and indeed hardly could be, detailed. The general allegation that the defendant did entice and solicit with the prohibited object is therefore sufficient. *The King* v. *Fuller*, 1 B. & P. 180; *S. C.* 2 Leach, (4th ed.) 790; 1 East P. C. *c.* 2, § 33. 2 Gabbett Crim. L. 231.

4. The act of congress of March 3d 1865, *c.* 79, upon which the defendant relies as repealing the statute of this commonwealth under which this indictment was found, has no reference or application to the enticing of persons from one state into another for the purpose of entering military service there.

*Exceptions overruled.*

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COMMONWEALTH *vs.* JOSEPH JOHNSON.

In order to prove a former marriage in England, in support of an indictment for polygamy, a witness may testify to the general repute there, at a time anterior to his acquaintance with the defendant.

One may be found guilty of polygamy, under Gen. Sts. *c.* 165, §§ 4, 5, who has married here during the lifetime of his former wife, and within one year after leaving her in England, although she has never been out of England; and proof of these facts will support an indictment which alleges such second marriage, his former wife "not having been continually remaining beyond sea, and not having voluntarily withdrawn from" him, "and remained absent for the space of seven years together."

INDICTMENT, found in Essex county, for polygamy, alleging that the defendant, Joseph Johnson, in August 1850 was married to Alice Oates in England, and in September 1863 was married to Eliza Holmes in the city of Lawrence, he being then the lawful husband of Alice Oates, she being then living, and "not having been continually remaining beyond sea, and not having voluntarily withdrawn from the said Joseph Johnson and remained absent for the space of seven years together."

At the trial in the superior court, before *Lord*, J., the evidence tended to show that some fifteen years since the defendant was

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married to Alice Oates in Bradford, England; that he was living with her as his wife in said Bradford in 1862, and that in the latter part of that year he left his wife in England and came to this country, and on the 14th of September 1863 was married to Eliza Holmes at Lawrence, with whom he afterwards cohabited in this state as his wife, his first wife being still alive. There was no evidence that the defendant or his wife ever lived anywhere except in Bradford until he started for this country, and it did not appear that she was ever in this country or out of England.

Henry Fowler was called as a witness on the part of the Commonwealth, and testified that he visited England in 1858, and remained there until the following April, staying most of the time at Bradford; that when a boy he knew a girl named Alice Oates; that by reason of his interest in Thomas Johnson, the defendant's brother, with whom he was acquainted in this country, and who came from Bradford, and whose family and friends resided there, he made particular inquiries in relation to the family connections of said Thomas, and there learned from general reputation that the defendant was married to Alice Oates. This evidence was admitted, against the defendant's objection.

The defendant contended that the Gen. Sts. *c.* 165, §§ 4, 5,* did not apply to this case if it appeared that the said Alice had been continually residing beyond sea since her marriage; or that, if the statute applied, there was a variance between the allegations and the proof in this respect, and the fact that said Alice had always resided in England negatived the allegation in the indictment that said Alice had not been continually

* Gen. Sts. *c.* 165, § 4, provides for the punishment of polygamy; and § 5 is as follows:

"The provision of the preceding section shall not extend to any person whose husband or wife has been continually remaining beyond sea, or has voluntarily withdrawn from the other and remained absent for the space of seven years together, the party marrying again not knowing the other party to be living within that time, nor to any person legally divorced from the bonds of matrimony, and not the guilty cause of such divorce."

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remaining beyond sea; but the judge ruled that the subsequen clauses of § 5 as to the seven years without reason to suppose the other party living applied as well to the clause of the section relating to a residence beyond sea as to the other absence of the party; and that if the defendant was married to Alice Oates and was living with her as his wife in 1862, and came to this country, leaving his wife in England, and married again in this country, he was not within the statute exception.

The jury returned a verdict of guilty, and the defendant alleged exceptions.

*W. S. Gardner* for the defendant.

*Reed*, A. G., for the Commonwealth.

DEWEY, J. 1. The testimony of Fowler was competent, under Gen. Sts. *c.* 106, § 22, to be submitted to the jury in connection with the other evidence, to establish the fact of the marriage of the defendant with Alice Oates.

2. The defendant does not bring himself within the excepted cases enumerated in Gen. Sts. *c.* 165, § 5. The fact that his wife "has been continually remaining beyond sea" for the last year, abiding at her usual place of abode, (he having deserted her, and come to this country,) does not exempt the defendant from punishment for polygamy. Further, it may be added that the provision in § 5, "and remained absent for the space of seven years," applies as well to the case of the wife remaining beyond sea, as to the case where one party "has voluntarily withdrawn from the other." The court properly ruled that if the defendant was married to Alice Oates, and was living with her as his wife in 1862, and he came to this country, leaving her in England, and married another woman in this country, he was not within the statute exception.

3. The variance between the proof and the allegation in the indictment in respect to his wife Alice Oates continually remaining beyond sea is wholly immaterial. The case as proved established all that was essential to sustain the indictment under the statute. *Exceptions overruled.*

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## Commonwealth *vs.* Benjamin F. Nichols.

An indictment which alleges that the defendant "did unlawfully keep, offer for sale and sell" adulterated milk charges but one offence.

In support of such indictment, one who in a great many instances has used a lactometer, for the purpose of testing the quality and purity of milk, may testify to the result of an experiment made by him with the same lactometer upon the milk in question, although no evidence is offered as to the character of the instrument.

Indictment alleging that the defendant, on a certain day and at a certain place, "did unlawfully keep, offer for sale and sell to one Patrick Keenan, for the sum of forty cents, a large quantity, that is to say, eight quarts of adulterated milk, to which a large quantity, that is to say, six quarts of water had been added; he the said Nichols well knowing said milk so sold to be adulterated, and well knowing that said large quantity of water had been added to said milk."

The defendant filed a demurrer to said indictment, which was overruled.

At the trial in the superior court, before *Brigham*, J., Henry Faxon, inspector of milk, was a witness for the Commonwealth, and, after testifying that in the course of five or six years he had used a lactometer in five or six thousand instances, for the purpose of testing the quality and purity of milk, he was allowed to testify, under objection, that he had applied this lactometer to milk sold by the defendant to Patrick Keenan, and what was indicated by the lactometer as the specific gravity thereof and what was the standard specific gravity of pure milk, according to the lactometer. There was no evidence as to the character of this instrument, the principles of its construction and operation, or its accuracy.

There was no evidence that the defendant knew the milk to be adulterated, and the defendant requested the court to rule that for this reason he was entitled to an acquittal; but the judge ruled otherwise.

The jury returned a verdict of guilty, and the defendant alleged exceptions.

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*C. H. Hudson*, for the defendant.

*Reed*, A. G., for the Commonwealth, cited, as to the sufficiency of the indictment, *Commonwealth* v. *Hall*, 4 Allen, 305, *Commonwealth* v. *Brown*, 14 Gray, 430; *Commonwealth* v. *Twitchell*, 4 Cush. 74; *Stevens* v. *Commonwealth*, 6 Met. 241; *Commonwealth* v. *Eaton*, 15 Pick. 273; and as to Faxon's evidence, *Carpenter* v. *Wait*, 11 Cush. 257; *Ingledew* v. *Northern Railroad*, 7 Gray, 90; 1 Greenl. Ev. § 440.

CHAPMAN, J. The authorities cited for the Commonwealth fully establish the sufficiency of the indictment. It alleges only a single offence.

The objection that it was necessary to prove the knowledge of the defendant that water had been added to the milk is groundless. *Commonwealth* v. *Farren*, 9 Allen, 489.

The practical experience of Faxon, the inspector of milk, had been such that his testimony was admissible. *Carpenter* v. *Wait*, 11 Cush. 257. Tests by means of instruments are much used in a great variety of cases, and are found to be trustworthy, and for this reason they are admissible in evidence. In each particular case, the value of the test must be estimated by the jury.

*Exceptions overruled.*

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COMMONWEALTH *vs.* NATHAN HOLBROOK.

**The payment of a license fee and a tax to the United States under the internal revenue acts does not authorize the sale of intoxicating liquors in this commonwealth in violation of the laws of this commonwealth.**

INDICTMENT, found in Norfolk county, for being a common seller of intoxicating liquors. The defendant filed a plea in bar, alleging that he had at the time of the indictment a license of the United States for which he had paid the sum of twenty dollars, and which authorized him to do the acts complained of, and also that he had paid a tariff or revenue duty and tax upon the same liquors to the government of the United States, for the

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keeping and selling of which he is complained of in the indictment, and that the said tax was paid upon the same liquors, in the same packages, and in the same form and quantity in which he sold the same. The district attorney filed a general demurrer to this plea, and *Rockwell*, J., before whom the case was heard in the superior court, sustained the demurrer, and the defendant waived his right to answer further, and alleged exceptions.

*N. Richardson*, for the defendant.

*Reed*, A. G., for the Commonwealth.

Gray, J. The defendant does not allege that he was an importer, or that the liquors which he is indicted for selling in violation of the laws of the Commonwealth were imported. He contends that having obtained and paid for a license as a retail dealer, and having also paid a tax upon these liquors in the same packages, under the internal revenue acts of the United States, he cannot be punished under the statutes of a state for selling them in the same packages, and stands in the same position in this respect as an importer of foreign spirits who has paid a duty at the custom-house. But the distinction is obvious, and is pointed out in the cases on which the defendant relies. *Brown* v. *Maryland*, 12 Wheat. 441–443. *The License Cases*, 5 How. 574, 577, 583, 588–592, 610, 611, 620, 631.

The reasons why a state cannot tax imported goods in the hands of the importer are twofold: 1st. Because the power of congress to regulate commerce with foreign nations is paramount, and, at least so far as it has been exercised by congress, cannot be interfered with by the state; 2dly. Because a state is expressly prohibited to lay any tax or duty on imports. Neither of these reasons applies to the domestic and internal trade and business of a state, the regulation of which belongs exclusively to the state. The United States can neither confer nor take away a right to sell the products of domestic industry. Even imports are protected from state legislation only while they are in the original packages in the possession of the importer, not after they have become part of the mass of property of the Commonwealth. And it is for the state, and the state alone, to determine what internal trade and business shall be

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lawful, and how and under what restrictions it shall be conducted.

Congress has indeed the power to levy and collect taxes, duties, imposts and excises on all the property and business of the country. But this power to tax does not in itself involve any power to regulate. The power to regulate is distinct from, and not subordinate to, the power to tax. Foreign commerce, congress may both regulate and tax. Domestic traffic within the limits of a state, it may tax, but it cannot regulate. A state law taxing imports, or requiring the importer to pay the state for a license before selling them, is void, not merely because congress has levied a duty on them, but because congress may regulate and authorize, and has regulated and authorized, their introduction. If the power of congress to tax what it cannot regulate took away from the state the power of regulation, the extraordinary result would follow that every branch of domestic traffic or employment which congress should see fit to tax would be removed from all control or regulation whatever.

The license which the defendant sets up in his plea did not, by the very terms of the act of congress under which it was granted, and according to a decision already made by this court, authorize him to exercise any trade or occupation in violation of the laws of the Commonwealth. U. S. St. 1862, *c.* 119, §§ 64, 67; 12 U. S. Sts. at Large, 455, 459. *Commonwealth* v. *Thorniley*, 6 Allen, 445. The reasons given in that case apply also to the defence sought to be established by reason of the payment of a tax to the United States.

It is true that the provisions of the act of congress, imposing this tax, to which the defendant has referred us, do not contain a saving of the laws of the state. U. S. St. 1864, *c.* 173, §§ 55, 57, 64, 94. But its provisions as to licenses are like those of the act of 1862, with this clause added in § 78, "that no license hereinbefore provided for shall, if granted, be held or construed to exempt any person carrying on the trade, business or profession, specified in said license, from any penalty or punishment provided by the laws of any state for carrying on such trade, business o profession within such state;" so that, in order to maintain this

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defence, it would be necessary to hold that payment of a tax to the United States would imply an exemption from state authority, which a direct license from the United States to sell the goods taxed would not give.

This seems to the court to be a case to which the words of Chief Justice Marshall in *Cohens* v. *Virginia*, 6 Wheat. 443, are peculiarly applicable. "To interfere with the penal laws of a state, where they are not levelled against the legitimate powers of the Union, but have for their sole object the internal government of the country, is a very serious measure, which congress cannot be supposed to adopt lightly, or inconsiderately. The motives for it must be serious and weighty. It would be taken deliberately, and the intention would be clearly and unequivocally expressed."

We are therefore unanimously of opinion that the payment of a license fee and a tax to the United States under the internal revenue acts does not protect the defendant from punishment for violating the criminal laws of the Commonwealth.

*Exceptions overruled*

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## SUFFOLK COUNTY.

### Abby T. Prescott *vs.* Richard Ward.

If an administrator has in his possession a note due from his intestate and refuses to pay it or deliver it to the owner, an action at law may be maintained upon it, to recover the amount from the assets of the estate of the intestate.

Delay by a man to fulfil a promise to marry, and services rendered to him by the woman during the continuance of the engagement, in procuring and taking care of his clothing, are a sufficient consideration for a promissory note given by him to her; and the fact that other motives entered into his mind and induced him to give it is immaterial.

The extent to which the cross-examination of a witness may be carried, in relation to events in his own life, long anterior to the existence of the matters in controversy in the suit, and having no connection therewith, rests within the discretion of the presiding judge.

If the defendant in an action upon a promissory note has possession of the same and refuses to produce it, a witness who is acquainted with the defendant's handwriting may testify that he has seen the note and that the body and signature were in his opinion in the defendant's handwriting.

If an administrator, in an action against him on a promissory note given by his intestate to

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a woman, defends on the ground that she was his intestate's mistress, and that the note was given for an illegal consideration, and he, being a witness, testifies on cross-examination that he and his family had received her as a visitor, and that she had been intimate with them, he cannot be allowed to testify further that after her last visit to them he gave notice to his intestate not to bring her there again. Nor can the plaintiff be allowed to introduce in evidence letters written to her, in the absence of the intestate, by a member of his family, for the purpose of showing the character of the intercourse between them.

CONTRACT. The declaration alleged that George C. Ward, the defendant's intestate, made a promissory note, the substance of which was annexed, and that an exact copy could not be annexed because the note was in the defendant's possession; and that the defendant owed the plaintiff the amount thereof and interest. The note described was dated November 14th, 1857, for $10,000, payable to the order of the plaintiff on demand with interest.

The answer denied the making or delivery of the note; and averred that, if such note was made and delivered, it was without consideration, and for an illegal and immoral consideration, and was paid during the life of George C. Ward.

At the trial in this court, before *Chapman*, J., the plaintiff introduced evidence tending to prove that she held such a note as is described in the declaration, and in November 1860 delivered it to the intestate, to be kept for her temporarily, and that it had not been returned to her. The defendant's counsel contended that the plaintiff's remedy was in trover, and not by an action of contract; but the judge instructed the jury that if the plaintiff had proved to their satisfaction that such a note had existed and been put by the plaintiff into the hands of the intestate to be kept by him for a temporary purpose, and if he had not returned it to her, according to the terms on which he received it, this action would lie.

The plaintiff, in proving her case, offered evidence tending to show what was the actual consideration of the note. The evidence tended to show that she and the intestate had been for many years engaged to be married to each other; that she had made many purchases of clothing for him, and taken care of his clothes; that she had procured, at his expense, the materials for a wedding dress, and that it had been made; that the wedding

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had been postponed by the sickness and death of her daughter; that it had been again postponed in consequence of the bad conduct of her son, who had occasioned some trouble to the intestate; that the intestate had declared that he would not marry her as long as the son was about; that on another occasion, when she was dangerously sick, he declared that he should have married her long ago if it had not been for his business. The plaintiff's sister, Mrs. Dora Whitney, testified that the intestate told her the note was given to the plaintiff as security in case he should die, so she might be provided for, and in consideration of the engagement being suspended. But the witness further stated that this was her own language and not the language of the intestate. There was also evidence as to the conduct and circumstances of the parties before and after the date of the note. The defendant's counsel contended that, upon this evidence, the note was given in the nature of a *donatio causa mortis*, and that the evidence did not show a sufficient consideration for the note. The jury were instructed that it was for them to find, as a question of fact, what the consideration was; that if it was a *donatio causa mortis*, it was without consideration and was void; but if it was given in consideration of any services performed by the plaintiff, or in consideration that the intestate had unreasonably delayed to perform his promise of marriage, it would be valid.

The plaintiff's said sister, who was one of the principal witnesses in her behalf, stated, on the direct examination, that she was a widow when she married her second husband; and, upon cross-examination, that she was married to her first husband, George Prescott, in 1839, and that he died in 1843 or 1844, and that she was married to her second husband in 1845. The defendant's counsel proposed to her the following question: "Did you not make an attempt to get money from the estate of a Mr. Smith, or his heirs, on the ground that you had been married to him?" This question was objected to, and the judge excluded it.

The defendant's counsel, in cross-examination of Mrs. Whitney, proposed to exhibit certain papers, which they alleged were

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signed by her, and inquire of her, first, whether or not she signed them at their respective dates, and also to inquire of her, after examining those papers, whether she was not mistaken in her evidence as to the time when she was married to Prescott; but the judge, on the objection only of the plaintiff's counsel, refused to permit said papers to be exhibited to her and said questions to be put.

These papers were all dated in 1842, and purported to be signed by Dorothea Prescott: one of them was a release to John H. Smith from any charge of being the putative father of a child, of which she had recently been delivered; and another was a release to said Smith of all causes of action against him, and described the signer of it as a single woman.

The plaintiff introduced Francis A. Prescott as a witness, who testified that he was acquainted with the handwriting of the intestate; that the plaintiff at one time showed him the note declared on, and that he cast the interest upon it for her; and that both the body of the note and in his opinion the signature were in the handwriting of the intestate. The defendant's counsel objected that, the note not being produced, this species of evidence was incompetent; but the objection was overruled.

The defendant contended that the plaintiff and the intestate, who was his brother, were not engaged to be married, but that the intestate kept her as his mistress. He was a witness, and testified to facts which, as his counsel alleged, tended to establish this defence. On cross-examination, the defendant testified that he and his brother came from New Hampshire; that they had a father, mother and sisters residing there; that his father and mother and some of his sisters had visited Boston; and his testimony tended to show that they had been introduced to the plaintiff by the intestate; that she had made purchases of some goods for them, with the knowledge of his brother; and that his brother had taken her to New Hampshire to visit them. He also testified that when he resided in Boston in 1851 one of his children was sick and died; that the plaintiff was very intimate in his family, and assisted his wife in taking care of the child while it was sick and at its death; and that for a year or more

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about that time, she was very intimate in his family. He also stated that his brother brought her to his house at Malden to visit his family about seven or eight years before his death. He also identified several letters, which he testified were in the handwriting of his sister, Mrs. Smith.

After the cross-examination, his counsel offered to prove by him that after the intestate brought the plaintiff to visit his family the last time, he gave the intestate notice not to bring her there again. This was objected to and was excluded.

In reply to the defendant's evidence, the plaintiff offered the letters of Mrs. Smith to the plaintiff, which had been proved by the defendant. They were objected to, but were permitted to be read. The judge ruled that they were admissible, not as independent statements of Mrs. Smith, but to show the character of the intercourse that subsisted between her and the plaintiff; that they were to be taken in connection with the evidence, which tended to show that the intestate had introduced the plaintiff to his parents and sisters, and knew the intercourse between them; and that if from all the evidence they believed that the intestate had introduced the plaintiff to any of these relatives as the person to whom he was betrothed, and permitted them to treat her as such, this would be evidence tending to show that an engagement of marriage actually subsisted.

The jury found a verdict for the plaintiff, and the defendant alleged exceptions.

*E. D. Sohier & C. A. Welch*, for the defendant. An action of contract against the defendant is not the proper remedy of the plaintiff. The note itself is alleged to be in the defendant's hands, and as administrator he is only liable for its detention. The evidence of Mrs. Whitney shows that the note was a *donatio causa mortis*. It was given to the plaintiff to provide for her, in case he died, as a security. It was to be available only in case of his death, and therefore is invalid. The inquiries to Mrs. Whitney on cross-examination were competent. She did not object to answer them. The papers exhibited to her had a direct tendency to contradict her testimony that she had been married to her first husband in 1839, and also to affect her

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standing The opinion of a witness as to the handwriting of a document not produced is incompetent. The defendant should have been allowed to explain his relations to the plaintiff, by testifying that he gave notice that she should not be brought to his house again. The letters of Mrs. Smith were inadmissible. The intestate had no knowledge of them. *Ilsley* v. *Parsons*, 2 C. & P. 201. *Walkup* v. *Pratt*, 5 Har. & Johns. 51, 57.

*T. Willey & F. W. Hurd*, for the plaintiff. An action in this form is the proper remedy. *Tower* v. *Appleton Bank*, 3 Allen, 387. *Almy* v. *Reed*, 10 Cush. 421. *Fales* v. *Russell*, 16 Pick. 315. The evidence as to handwriting was competent. *Almy* v. *Reed*, 10 Cush. 421. The letters of Mrs. Smith were also competent. *Thurston* v. *Cavenor*, 8 Iowa, 161. *Ray* v. *Smith*, 9 Gray, 141. *Wightman* v. *Coates*, 15 Mass. 1.

Bigelow, C. J. 1. The objection to the form of the action is not tenable. The note declared on, according to the theory on which the plaintiff's case proceeded at the trial, has not been paid, taken up, cancelled or destroyed. It was in the hands of the intestate at the time of his decease for safe keeping, and in trust for the plaintiff. On his death it went into the hands of the defendant in his capacity as an administrator, to be held in the same manner and for a like purpose. It is a valid, subsisting debt against the estate of the intestate. To say that the remedy of the plaintiff is only by an action in the nature of trover against the defendant for his tortious act in refusing to surrender the note to the plaintiff on due demand would be to compel her to seek redress by an action against him in his individual capacity for a conversion of the note, instead of allowing her rightful claim against the estate of the intestate in his hands for the amount of the note. Doubtless he may be individually liable for such conversion, but his wrongful act in retaining and withholding the note cannot take away her right to receive the debt from the assets of the deceased. If the intestate in his lifetime had refused to surrender the note to the plaintiff, it is clear that an action of assumpsit to recover the amount could have been maintained. *Smith* v. *M'Clure*, 5 East, 477. Or the same principle, if an administrator wrongfully

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withholds a note due from his intestate an action will lie on the note to recover the amount in the form of a judgment against the assets of the deceased. The note is still a valid claim against the estate. It cannot be proved by the best evidence, for the reason that the administrator refuses to give it up or to produce it. Such refusal renders secondary evidence of the contents of the note competent and sufficient to warrant a recovery for the amount. The absence of the note affects only the nature of the evidence necessary to support the action; not the form of remedy.

2. A sufficient consideration for the note was clearly proved, and found by the jury under the instructions given by the court. Of the value of the services rendered by the plaintiff to the intestate, or of the loss and injury which she had sustained in her feelings and worldly situation and prospects by the delay of the deceased to fulfil his promise of marriage, no evidence was offered. These certainly constituted a valuable consideration for the note, and, there being no evidence of their inadequacy or insufficiency, the presumption arising from the fact that the note was expressed to be for value received is to have full effect, and well supports the verdict. The fact that other motives entered into the mind of the intestate and induced him to give th note, in addition to those which constituted a valuable consideration, has no tendency to show that the latter did not exist, or that they were insufficient to support the promise. The finding of the jury negatives the theory that the note was intended as a *donatio causa mortis.*

3. The inquiries put to the plaintiff's witness on cross-examination concerning the date of her marriage, and the exhibition of certain papers to her in connection with such inquiries, were rightly excluded by the court. They related to matters entirely collateral and immaterial to the issue between the parties. So far as they had any tendency to contradict the witness or disparage her character, it was within the discretion of the presiding judge either to allow or reject them. On all matters not relevant to the issue, the extent of cross-examination is to be regulated by the judicial discretion of the judge at the trial.



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4. The testimony of the witness to the fact that the note declared on was in the handwriting of the defendant and bore his signature was clearly competent. Indeed it was the only evidence on this point which was within the reach of the plaintiff, or of which this part of the case was susceptible. The non-production of the note rendered the best evidence unattainable, and a resort to evidence of a secondary nature was necessary and proper. To hold otherwise would enable a party, by wrongfully withholding a note, effectually to prevent any proof of its existence from being offered in a court of justice.

5. Evidence that the defendant gave notice to the intestate not to bring the plaintiff to his house was inadmissible. It had no tendency to disprove the facts on which the plaintiff relied, but was a separate and independent occurrence at which the plaintiff was not present, and of which she had no knowledge.

6. But for a similar reason the letters of Mrs. Smith, which were offered by the plaintiff and admitted in evidence, should have been excluded. The gist of the inquiry before the jury was, whether the intestate at the time the note in suit was given or previously had made a promise to the plaintiff to marry her, which he had failed to fulfil, and the performance of which was suspended at his instance and request. The letters offered in evidence might have been competent, as bearing on the subject of inquiry, if it had appeared that they were written at or about the time the note was given, and if it had also been shown that they were known to the intestate. Accompanied by such evidence, the letters might have had some tendency to prove the nature of the relation which subsisted between the plaintiff and the intestate, and that the note was given in whole or in part for the consideration alleged by the plaintiff. But in the absence of any such evidence, they were clearly irrelevant. The intestate could not be affected, or the state of his feelings and intentions towards the plaintiff be shown, by proving facts, of the existence of which it did not appear that he had any knowledge As we have no means of knowing how far the contents of those letters may have affected the minds of the jury, we are constrained to send the case to a new trial. *Exceptions sustained.*

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EPHRAIM S. WILLARD *vs.* CHARLES KIMBALL.

The owner of goods cannot maintain an action against an officer for taking them in the due service of a writ of replevin against another person who had them in his possession.

METCALF, J. This is an action of tort, in which the defendant, sheriff of Middlesex, is sued for the conversion, by his deputy, of two hundred and twenty tons of coal, the property of the plaintiff. The defendant's answer denies that the coal was the property of the plaintiff, and also alleges that his deputy took possession of the coal on a writ of replevin in favor of Sinnickson & Glover of Philadelphia, against William A. Knowles; which action of replevin was entered in the superior court in Middlesex, and was pending there when said answer was filed.

At the trial of the present case in the superior court in this county, it was ruled that the action could not be maintained, and a verdict was returned for the defendant. The plaintiff alleged exceptions to this ruling, and an elaborate argument has been had upon the complicated evidence contained in the bill of exceptions, as to the legal ownership of the coal. But we are neither required nor inclined to examine the question of ownership; because, if we were satisfied that the plaintiff is the legal owner of the coal, we deem it clear, on the papers in the case, that he has no legal cause of action against the defendant, or against his deputy. And it is not material whether the judge of the superior court took or did not take this ground of defence into consideration, when he ruled that the action could not be maintained.

The papers show the facts alleged in the defendant's answer to be true; that a writ of replevin, in due form of law, was put into the deputy's hands, sued out by the persons named in the answer, against William A. Knowles, in whose possession the coal then was, and that the deputy served that writ, in all particulars, in the manner prescribed by law, taking the coal from the possession of Knowles. This shows a justification of the deputy in serving the writ. Neither he personally, nor the defendant, whose deputy he is, can be held liable in damages to

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this plaintiff for that service, even though it could be proved that the plaintiffs in that action of replevin had no rightful claim to the coal, and that this plaintiff was sole owner of it. The deputy did what his precept commanded him to do, and nothing more. What the result of that action of replevin was, we are not informed, and need not know; whether it is still undecided, or whether judgment has been rendered for the defendant in replevin. There can be no pretence, we think, that the failure of a plaintiff in replevin to maintain his action renders the officer who served the writ liable in damages to the defendant, or to any other person who may have a claim to the replevied property.

By the English law, if the defendant in replevin claim property in the goods or chattels described in the writ, the officer cannot lawfully deliver them to the plaintiff, until the question of property has been determined in his favor on a writ *de proprietate probanda*, sued out by him. Dalt. Sheriff, 435. 3 Steph. N. P. 2487, 2488. 5 Dane Ab. 526. And authorities were cited, by the plaintiff's counsel, which show that trespass is maintainable against the officer, if he, in such case, serves the writ and delivers the goods or chattels to the plaintiff. But as we have no such law, these authorities do not aid the plaintiff. By our law the question of property is to be tried in the replevin suit.

In *Hallett* v. *Byrt*, Carth. 381 — which was an action of trespass for taking the plaintiff's cows, and in which the defendant pleaded that he, as an officer, took them on a writ of replevin — there is a *dictum* of Lord Holt which in our judgment states the law correctly. "There is," said he, "a difference between a replevin and other process of law, with respect to the officers; for in replevin they are expressly commanded what to take, *in specie;* but in writs of execution the words are general, namely, to levy of the goods of the party, and therefore 't is at their peril if they take another man's goods; for in that case an action of trespass will lie." And the supreme court of New York has decided, in the case of *Foster* v. *Pettibone*, 20 Barb 350, that trespass cannot be maintained, by the owner of goods against a sheriff for taking them under and pursuant to a writ

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of replevin against another person having them in possession. In Bac. Ab. Trespass, G, 1, and Trover, D, *Hallett* v. *Byrt* is cited to the position that neither trespass nor trover will lie against an officer for taking, on a writ of replevin, the goods therein specified as the property of A. though they may have been the property of B. See also Vin. Ab. Trespass, F, a 2, F, a 4.

Whether an officer would be liable to the true owner of goods, if, on a writ of replevin commanding him to take them from the possession of the defendant in replevin, he should take them from such owner, or from some other person, is not a question now before us. See *Shipman* v. *Clark*, 4 Denio, 446, and *Stimpson* v. *Reynolds*, 14 Barb. 508. *Exceptions overruled.*

*G. A. Somerby*, for the plaintiff, cited *Milles* v. *Davies*, Com. R. 596; *Hallett* v. *Byrt*, Carth. 380; *Leonard* v. *Stacy*, 6 Mod. 69; *Clark* v. *Skinner*, 20 Johns. 465; *Dunham* v. *Wyckoff*, 3 Wend. 280; *Stewart* v. *Wells*, 6 Barb. 79; *Stimpson* v. *Reynolds*, 14 Barb. 508.

*T. H. Sweetser & J. Nickerson*, for the defendant.

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## Robert S. Campbell *vs.* Charter Oak Fire and Marine Insurance Company.

If a policy of insurance is not payable till ninety days after due notice and proof of loss, in conformity to the conditions thereto annexed, and the notice and proof of loss which are furnished to the insurers, in compliance with a requirement in the conditions that such notice should show in what manner the building was occupied, state that it was occupied as a hotel, and it appears in proof that no license had been given to keep it as a hotel, and a memorandum of special hazards annexed to the policy prohibits all unlawful business, no action can be maintained upon the policy. So if such notice contains a statement that the building was lighted with burning fluid, and the memorandum of special hazards provides that the policy shall be void if burning fluid is used without permission in writing indorsed on the policy, no action can be maintained.

If an incorrect statement of a material matter has been made through mistake in a notice and proof of loss which were furnished to insurers, in compliance with a requirement in the conditions of insurance annexed to a policy, and no amended statement has been furnished to the insurers before the trial of an action upon the policy, the insured cannot be allowed to prove the mistake, and show that the facts were not as therein stated.

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Campbell v. Charter Oak Fire and Marine Insurance Company.

CONTRACT upon a policy of insurance, for one year, dated September 21st 1861, issued by the defendants upon the hotel known as the Neptune House on Chelsea Beach, payable to the plaintiff as mortgagee in case of loss. The policy contained a written provision, inserted upon its face, that "it is understood and agreed that the house is to be occupied the entire year;" and also the following printed provisions: the loss "to be paid within ninety days after due notice and proof thereof made by the assured, in conformity to the conditions annexed to this policy." "It is further agreed that in case the abovementioned premises at any time after the making of and during the time this policy would otherwise continue in force shall from any cause be vacant or without occupant, unless notice of the same shall first have been given to this company and mentioned in or indorsed upon this policy, this insurance shall be void and of no effect." "And that this policy is made and accepted upon and in reference to the application, plan, description or survey filed in this office, and the terms and conditions hereunto annexed, which are to be used and resorted to in order to explain the rights and obligations of the parties hereto, in all cases not herein otherwise specially provided for." The policy was signed at the foot of the first page. On the second page were printed certain classes of hazards, under which were the following clauses: "Camphene, spirit gas or burning fluid, when used and kept on the premises for any purpose, subjects the property insured to an additional charge; and permission for such use or keeping must be indorsed in writing on the policy; otherwise the same shall be void and of no effect." "And all unlawful business or trade is also prohibited." Conditions of insurance were also annexed, in which it was provided that "persons sustaining loss or damage by fire are forthwith to give notice thereof in writing to the company; and as soon after as possible they shall deliver as particular an account of their loss or damage as the nature of the case will admit, signed with their own hands. And they shall accompany the same with their oath or affirmation, declaring the said account to be just and true showing also . . . . in what general manner (as to trade,

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manufactures, merchandise or otherwise) the building insured, or containing the subject insured, and the several parts thereof, were occupied at the time of the loss."

At the trial in the superior court before *Russell*, J., after the decision reported in 7 Allen, 45, *note*, the plaintiff put in a notice under oath, by Henry Bates, the owner of the building, to the defendants, dated and delivered to them on the 7th of November 1861, stating among other things that the hotel was destroyed by fire on the 3d of that month; that he "occupied and kept the said building as and for a public hotel at the time of the said loss, and had done so from the date of said policy." On the 27th of the same November said Bates made an additional statement in writing to the defendants, showing among other things that "the house was always lighted by burning fluid in lamps."

The defendants proved that during the year 1861 neither Bates, nor his partner who was interested with him in keeping the house, when open, nor the plaintiff, was licensed as an innholder or common victualler; and they contended that the above statements in the two notices given to them showed of themselves a violation of the policy, and were conclusive. But the judge allowed the plaintiff to claim on evidence already in, and to show in rebuttal, that the house was not open for the business of an inn on the day of the fire or after the date of the policy; that it was a beach house, only open for the summer season; that it was closed about the middle of September, two men only being left in charge to take care of the house, and some animals left there for the winter; that no burning fluid had been used there since the date of the policy; and that the second statement was obtained through the fraud of the defendants' agent. There was no evidence that the first notice was procured by fraud.

The judge instructed the jury that the facts stated in the preliminary proofs, so far as they were not shown to have been made in mistake or induced by fraud, were conclusive against the plaintiff; that the statements therein, if not by mistake or fraud, would prevent the plaintiff from recovering.

The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

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*G. O. Shattuck*, for the defendants.

*A. A. Ranney*, for the plaintiff. The ruling as to the effect of the statements found in the preliminary proofs was at least sufficiently favorable to the defendants. They themselves went into additional proof at the trial on the same point, and it was competent for the plaintiff to rebut this. There was a waiver by the defendants of the estoppel, if there was any estoppel. *Dutton* v. *Woodman*, 9 Cush. 255. *Adams* v. *Barnes*, 17 Mass. 365. *Howard* v. *Mitchell*, 14 Mass. 241. These statements are not conclusive as estoppels *in pais*. They are only evidence as admissions. Only intentional false swearing will avoid a policy. *Levy* v. *Baillie*, 7 Bing. 349. A mistake is not an estoppel. There must be fraud or bad faith to constitute an estoppel. *Plumer* v. *Lord*, 5 Allen, 463. *Brewer* v. *Boston & Worcester Railroad*, 5 Met. 483. *Tolman* v. *Sparhawk*, Ib. 469. The defendants did not rely and act upon these statements, and therefore cannot set them up as estoppels. The statements, even taking them as made, do not necessarily and clearly mean that the house was kept open as an inn at the time named. A hotel is not necessarily an inn. Worcester's Dictionary. *Jones* v. *Osborn*, 2 Chit. R. 484. *Carpenter* v. *Taylor*, 1 Hilton, (N. Y.) 193. *Doe* v. *Leaming*, 4 Camp. 77. The statement as to burning fluid only implies that when the house was lighted it was done with burning fluid.

Dewey, J.* The principal question here is as to the effect of certain papers executed by the insured, and delivered to the defendants as the notices and statements made in compliance with art. 8 of the conditions of the policy. We do not understand that any objection is taken, or was open to the defendants, that the instructions were not sufficiently favorable to them upon the question as to the effect of the hotel having been used for illegal purposes, or as to the effect of using burning fluid in the same. The questions as to such use of the building were submitted to the jury to be settled as questions of fact upon all the evidence produced by the respective parties. It is contended on

* Gray, J. did not sit in this case.

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the part of the defendants that, irrespective of any evidence that was produced at the trial by the plaintiffs, to show that no such illegal use had actually been made, the present action cannot be maintained, inasmuch as the notice of loss by fire, and the accompanying statement of the manner in which the building was used, contained certain facts which wholly avoided the policy. Such statement of facts by the insured, it is said, must at least, while it remains in the office, as the representation of the facts in the case, unmodified and unqualified by any further documents, justify the defendants in declining to pay the loss, and constitute a good defence to an action instituted under those circumstances. This leads us to the inquiry as to the character of this statement, and the legal effect to be given to it.

The provisions on this subject in the policies made at an earlier period were much more general than those found in this policy. To a certain extent, a disposition has been manifested by the courts to deal with these statements liberally in favor of the insured, when objections have been raised to their sufficiency. This has been so where the defects have arisen from want of fulness in the statement, to which the insurers at the time took no objection, but refused payment of the loss upon some ground distinct from that of any defect in the preliminary proofs. But the objection arising from the omission to file in due time a notice of the loss and statement of the circumstances was sustained in the case of *Smith* v. *Haverhill Ins. Co.* 1 Allen, 297.

As already suggested, the conditions in this and similar policies are something more than is embraced in what have been usually spoken of as "preliminary proofs." Those, particularly in marine insurances, related usually to the mere fact of the loss and the interest of the party, and gave such evidence as was then known to the party, authorizing the belief of a loss by the perils insured against. Under the conditions annexed to this policy, the statement of the loss by the insured is required to be accompanied by various other statements in reference to the subject of their claim, and particularly that the insured is to state "in what general manner the building insured, or containing the subject insured, and the several parts thereof, were

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occupied at the time of the loss, and who were the occupants of such building."

In the present policy, the importance attached to the notice of the loss and statement of the circumstances, and the use of the property, is made obvious by the particulars required to be specified, and by the further provision that the loss is "to be paid within ninety days after due notice and proof thereof made by the insured in conformity to the conditions annexed to this policy."

The ground of defence to the present action is not the want of fulness in the notice of the loss and statement accompanying the same, but that the statement shows that the policy has been avoided by the acts of the insured, and that no liability exists thereon as against the defendants. In this statement the insured declared, "I occupied and kept the said building as and for a public hotel at the time of the said loss, and had done so from the date of said policy." This statement, taken in connection with the fact that the insured was not licensed to keep any such hotel, presented the case of carrying on an unlawful business, which avoided the policy, and would justify the defendants in not paying the loss.

A true statement was called for by the conditions of the policy. It was a condition precedent to the liability to be called upon to pay the loss. If this be rejected as being a false statement, then no statement has been filed, and for that reason the plaintiff cannot recover. If allowed to stand as a part of the statement, the policy had been avoided. It is difficult to perceive how the dilemma can be avoided, while this statement remains as the only one filed with the company.

The further statement which the insured has made, and which is described in the instrument under his signature as "in addition and as a part of his preliminary proofs under policy No. 2021," involves the case of the plaintiff in the further objection of stating "that the house was always lighted by burning fluid in lamps, but none had been lighted on the day of the fire, or since the evening before the fire."

So far as these statements or either of them were induced by the fraudulent acts of the insurers or their agents, no question

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can exist as to the right of the plaintiff to avoid them, and they may properly be controlled by evidence showing the facts to be otherwise, and that there has been in the use of the building no violation of the conditions of the policy.

But the more difficult question is, whether, when the statement filed by the insured is his free and voluntary act, and the insurers have no reason to doubt the truth of it, the insured may be allowed to contradict it, and establish a different state of facts on the trial of an action to recover the loss, upon showing that the statement was made under a mistake. Upon this point, we think the ruling of the court was erroneous. We do not mean to say that the party may not correct mistakes of fact in his original statement, but such corrections are not for the first time to be made known to the insurers at the trial of the action to recover for the loss, by the introduction of evidence showing that the statements filed were not true in a material fact, which, if it existed as stated, was fatal to the right of the insured to recover.

In *Worsley* v. *Wood*, 6 T. R. 710, the effect of a want of the preliminary proof stipulated for and required by the terms of the policy was much considered, and it was held that a compliance therewith was a condition to be performed before action brought for the loss. In the case of *Irving* v. *Excelsior Ins. Co.* 1 Bosw. 507, where the statements made in the preliminary proof showed that the plaintiff was not entitled to recover for the alleged loss, the court held that the plaintiff could not contradict the statements thus made, on the ground that they were made through mistake. Take the case where the statement distinctly affirmed that the building had been alienated before the loss, or that the loss was occasioned by a riot or an insurrection; may not the insurers act upon such statements, and properly refuse to pay the loss?

The inquiry is, whether, if the plaintiff relies upon the statement thus filed by him as the notice required in compliance with the conditions of his policy, he must not take it as it is, take it as a true statement of his claim, and the foundation for his suit. Having stated the use of the premises to have been

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such as would authorize the inference that the policy was void, and having filed no amendatory statement correcting such previous statement, can he upon the trial of the case be allowed to show that by mistake he has misled them in matters which he has obligated himself to state truly as a condition precedent to his right to remuneration for the loss? In the opinion of the court, the ruling excepted to was erroneous in qualifying the rule as to the conclusiveness of the statement, so as not to embrace a case where it was made by mistake. The defendants might properly rely upon the statement of the insured formally made under the provisions in the policy, at least until notice of such mistake; and an amendatory statement ought to be filed before instituting an action upon the policy.

Under the form of this policy, Henry Bates was the party insured, and the plaintiff has only the right to recover the avails of the same when it is made effectual by due notice and statement as to the loss.

We have not overlooked the points taken and urged in behalf of the plaintiff, that the court should allow estoppels excluding the truth only when honesty and good faith require it, and not to punish the party for an innocent mistake; but we apprehend that this rule can have no application to a question like the present, where the parties have created a liability solely on the terms stipulated in the policy.

It was also further urged that, as to the first statement, the defendants did not act upon it, but applied to the insured for further information, and obtained a more full and detailed statement. Perhaps so far as this second statement contradicts the first, it would be reasonable to give it the effect of an amended statement; but it must be taken as a whole, and, as such, if it qualifies the statement that the building was kept as a public hotel, it introduces another statement equally fatal to the policy, "that the house was always lighted by burning fluid in lamps."

In any view we can take of this case, we think the plaintiff must meet the defence upon the hypothesis that the statements of the loss and circumstances attending the same and the general

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use of the property, which had been filed with the company, were true statements, and the insurers may rely upon them as such until duly notified that they were made under a mistake of the actual facts. *Exceptions sustained.*

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BENJAMIN F. BURGESS & others *vs.* ALLIANCE INSURANCE COMPANY.

SAME *vs.* NEW ENGLAND MUTUAL MARINE INSURANCE COMPANY.

If a partial loss occurs upon a policy, for a sum expressed in dollars, made here, upon property situated in a foreign country, the rule for estimating damages is to determine the loss at the place where it occurred, in the currency of that country, and then to find the equivalent in the country where suit is brought, by determining the actual intrinsic value of the currency of that country, as compared with the currency of the other; and it is immaterial, in reference to this, that the policy contains a provision that in case of loss the company shall have the right to replace the articles lost or damaged with others of the same kind and equal goodness.

An open policy of insurance upon merchandise will not cover articles kept wholly or partially for use in and about a building, but only articles kept for sale; but an open policy upon "property" contained in specified buildings will cover articles kept for use as well as those kept for sale.

Two actions of contract upon policies of insurance. The first action was upon an open fire policy issued to the plaintiffs, for whom it concerns, by the Alliance Insurance Company, for "any sum not exceeding fifteen thousand dollars in any one place in any one time on merchandise in the buildings and on the wharf occupied by H. R. Bishop, located in Cabarien, Cuba, indorsements to be reported to this company at the close of each month. Liberty to have other insurance." This policy was indorsed as follows: "1864 Jan. 1. 1 mo. to Feb. 1, 64. $15,000 ¼ 37.50."

The second action was upon two open fire policies issued to the plaintiffs, for whom it concerns, by the New England Mutual Marine Insurance Company, one of which was for ten thousand dollars, "on property contained in buildings, sheds, yards and wharf in the ports of Cienfuegos and Cabarien, Cuba. Liberty

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of other insurance;" and the other was for five thousand dollars on the same subject. The first of these policies was indorsed as follows:

| Date. | Amount. | Rate. | Premium. | Situation. | Time. |
|---|---|---|---|---|---|
| 1864, Jan. 5. | 10,000. | ¼ | 25,00. | Cabarien. | 1 mo. to Feb. 5, '64. |

The second was similarly indorsed for $5000, for one month from December 28th 1863. All of the policies contained the following provision: "And the assured further covenants and agrees that, in case of loss or damage, the said company shall have the right to replace the articles lost or damaged with others of the same kind and of equal goodness, at any time after sixty days after notice of any loss."

The cases were reserved in this court upon the following agreed statement of facts:

"The defendants made to the plaintiffs the policies declared on, and a part of the property mentioned in the policies was destroyed by fire at Cabarien on the ninth day of January 1864, and the defendants received due notice and proof of the loss. At the time of the insurance and of the loss, and at the time when the loss became payable, the value, at said Cabarien, of the property destroyed was twenty thousand seven hundred and twenty-nine and $\frac{44}{100}$ dollars in the currency at Cabarien, and the currency of Cabarien was gold and silver; that is to say, gold doubloons and Spanish dollars. If with the coined dollars of the United States a purchase of exchange on Cabarien could be made here at par, the dollar of the United States would be treated as equal to the dollar of Cuba.

"The schedule hereto annexed contains a true statement of the property destroyed, and the value of each item thereof at said Cabarien, in gold and silver as aforesaid; and all of said property was covered by said policies and the indorsements thereon, provided said policies attached, except the items referred to in the statement signed by H. R. Bishop, hereto annexed; and in regard to said items the question is left to the determination of the court upon said statement, whether the species of property as described in said statement is covered by the terms of said policies.

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"The premiums on said policies were paid at Boston by the plaintiffs in paper currency of the United States.

"H. R. Bishop, a resident of said Cabarien, was owner of the property destroyed, and, if parol evidence of the fact would be admissible, the plaintiffs effected said insurance as the agents and in behalf of said Bishop; and the plaintiffs were duly authorized to effect the same, but such ownership was not communicated to the defendants or known by them.

"The plaintiffs claim that the judgments here should be for an amount which would make good to said Bishop at said Cabarien his said loss; and that, to effect this, judgments should be rendered for a sum which would have purchased a remittance payable in Cuba to the amount of the plaintiffs' loss at the time when the same was due and payable.

"The defendants, among other things, claim that by the terms of the policies they were, if liable at all, only liable to pay the amount of the loss at Boston, without the addition of any premium of exchange.

"If upon the foregoing facts the plaintiffs are entitled to recover, the causes are to be sent to an assessor to ascertain and make up the amount of the judgments, under the direction of the court; otherwise the plaintiffs to be nonsuit."

The schedule annexed contained items, chiefly of sugar and molasses, amounting in all to $20,729.54.

The statement of H. R. Bishop as to certain items in the schedule, concerning which special questions were raised, was as follows:

"The mast and boom had been taken by me from the lighter 'Don Quixote' some few months prior to the fire, and were stored for sale, and were not in use or kept for use by me.

"The two large molasses-pumps were not attached to the buildings, but could be and were transferred to different parts of the same building and of different buildings as I had occasion to use them.

"The four water tanks were not attached to the buildings, but were round and movable, although very large; they had been removed from another place to the place where they were standing when burnt but a few months prior to the fire.

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"The tanks were kept by us for the purpose of catching water to sell. Of course I used such of the water as I needed for my own use, but the greater portion I sold. There is no drinking water at Cabarien except rain water, which is caught in this way and sold to the inhabitants and the shipping; principally to the latter.

"The two large cars were used by me on a railroad track, connecting my warehouses with my wharf; they were platform cars and used for hauling freight. I had then offered them for sale, as I had other cars more suitable for my purpose on their way to me. The other car was a small car not used by me, as it was too small for my track, and I had it for sale.

"The four large street lanterns were hung on a hook attached to pulleys, so that they could be hoisted and lowered for cleaning and filling.

"The stationery was papers, pens, ink and memorandum books, all of which were new and unused.

"The custom-house book is a printed book of the rates of customs."

*S. Bartlett & F. Bartlett*, for the plaintiffs. The general question in these causes is, whether under a contract of indemnity made at one place, but attaching to property the *situs* of which, as fixed by the contract, is and is to remain in a foreign country, the assured in case of partial loss is limited by law to a recovery, at the place of the contract, of a sum less than one which will replace the portion of the property destroyed. The effects of a depreciated currency and of legal tender acts are not involved in the principle to be discussed. The same question would have arisen if this were now a gold-paying country. If the assured has by law, under the contract, a right to have the property or its value restored to him, at its *situs*, as fixed by the policy, then judgment will be rendered for such sum as will purchase, at the place of the contract, the means of restoration, so that only the ordinary difficulty which affects the question of damages in all cases of contract exists, namely, whether they are to be assessed in coin or currency. If the plaintiffs' claim to indemnity upon the principles above stated shall be rejected

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the only result will be that his indemnity will be still further reduced by its being paid in a depreciated currency.

The contract of insurance is uniformly declared to be one of indemnity, and it is to be liberally construed to effect its purpose. 1 Phil. Ins. § 124. 2 Ib. § 1481. The fact that the premium was paid in currency is immaterial. The use of the word "dollars" in the policy can have no tendency to show that the parties understood that indemnity should be limited to payment here of our dollars, by tale equal to the number of dollars of Cuba which would there repair the plaintiffs' loss.

In these policies, the clause authorizing the companies to replace the articles lost is most important. This is a concession to the insurers. It is clear, therefore, that without such concession they were bound to do something not less beneficial. The insurers thus declare that they are to replace the property, or furnish the insured with an equivalent.

The principles that govern marine insurance, as to the extent of indemnity, are applicable to the present question. In case of insurance here, by an open policy, on goods purchased at and shipped from a foreign port, the insured in case of loss is to be indemnified by payment here of such sum as is equal to the market value of the goods at the time and place of shipment, with the addition of the exchange at the market rate when the risk commenced. 2 Phil. Ins. §§ 1230, 1231. So in an open policy on a ship, if a partial loss occurs and expenditure to repair injuries is made in a foreign country, the place of the loss is the place of indemnity, and exchange is uniformly added to the expenditure. The same principle is applied in adjusting claims for loss by general average. 2 Phil. Ins. §§ 1359, 1427. Stevens & Benecke on Average, 79. These doctrines seem decisive of the principle that, the place at which a loss is to be estimated being fixed, if that place be a foreign country, exchange is to be added, to enable the insured to replace himself in the position he was in when the risk attached.

The term "merchandise," in the policy of the Alliance Company, covers the articles mentioned in the statement of Bishop; 2 Parsons Mar. Law, 200; or, if not, they are certainly covered



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by the term "property" in the other policies. 1 Phil. Ins. § 455 *Whiton* v. *Old Colony Ins. Co.* 2 Met. 1.

*M. Andros*, for the Alliance Insurance Company.

*H. C. Hutchins*, for the New England Mutual Marine Insurance Company.

Hoar, J. The court are of opinion that only the mast and boom, stored for sale, and the small railroad car, of the articles named in the statement of Bishop, can be considered as merchandise, within the meaning of the policy of the Alliance Insurance Company, and that they are to be so regarded. The word "property" has a much more extended meaning, and that being the word used in the policy of the New England Mutual Marine Insurance Company, we have no doubt that it includes all the articles enumerated in the statement.

The principal question is common to both cases, and it is this: whether, in case of a partial loss of property situated in another country, and insured here, in computing the sum to be recovered, anything is to be allowed for the expense of transmitting to that country the sum of money, which, paid there, would furnish an equivalent for the value of the property destroyed by fire? And we are of opinion that no such allowance can legally be made. In other words, nothing can be added for the cost of exchange in transmitting the funds which are of intrinsically equal value in this country with those which represent the pecuniary measure of the loss in the country where it occurred.

The cases of *Adams* v. *Cordis*, 8 Pick. 260; *Alcock* v. *Hopkins*, 6 Cush. 484; *Lodge* v. *Spooner*, 8 Gray, 166; and the recent case of *Hussey* v. *Farlow*, 9 Allen, 263, are decisive as authorities upon the point in this commonwealth, and we are satisfied with the correctness of the principle in its application to the cases now before us.

The argument for the plaintiffs is, that the contract of insurance is a contract of indemnity; and that an indemnity for the loss recovered here is such a sum of money as would purchase a remittance, which, when collected at the place where the loss occurred, would be an exact equivalent there to the value of the property destroyed. And it is urged that this view is sustained

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by the clause in the policy which gives the insurer the right to replace the property destroyed by other property of like kind and equal value.

The latter provision is made for the benefit of the insurer, and serves to protect him from an over valuation. If he elects to avail himself of it, he must of course replace the property at the place of the loss. But in that case he may avail himself of means which he may have there, or which he may procure from any other quarter. The expense he incurs has no necessary relation to the rate of exchange between the country of the loss and any other country in particular. On the other hand, if he does not elect to repair the loss, the obligation to pay the value of the property in money is not confined in its operation to any country. It may be enforced in any country in which the debtor may be found, or wherever jurisdiction can be obtained of the cause or the parties. There is nothing local about it. The debtor must pay where he is found or can be sued, and the creditor may not wish to transfer the money to the place where the cause of action accrued; certainly he is under no obligation to do so.

In the same country, the matter is very plain. If a man loses by fire property in New Orleans valued there at $1000, would it be contended that he would recover a different sum if he sued his insurer in New Orleans, or in Mobile, or St. Louis, or Boston? The only difference in principle between such an example and a loss in a foreign country would seem to be, that the loss is estimated in a different currency from that in which judgment is recovered in the latter case, and in the same currency in the former. Suppose the insurance companies, immediately after the loss occurred in Cuba, had ascertained its amount in Spanish dollars, and had given a promissory note for that number of dollars, without specifying the place of payment, would there be any allowance made for exchange if the note were afterward sued in another country?

It is true that the object of a policy of insurance is indemnity to the insured; but the standard of value used in estimating the amount of the loss may not under all circumstances produce the

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result of giving an exact indemnity at the place where a judgment is recovered upon the policy. The best practical rule for indemnity seems to us to be, to estimate the loss at the place where it occurred in the currency of that country, and then to find the equivalent in the country where suit is brought by determining the actual intrinsic value of the currency of that country as compared with that of the other, thus computing the value according to the real par of exchange. If the market value of exchange be regarded, the amount to be paid to constitute an indemnity would depend on the rate of exchange when the debt should finally be collected on the execution.

We are aware that the doctrines of this court on this subject are not uniformly approved by text writers, or by other courts, and that a considerable diversity of opinion has prevailed upon it. But it has been sanctioned by those whose opinion is entitled to respect, and best accords with our own judgment of the law. 1 Arnould on Ins. 330. Marsh. Ins. (4th ed.) 502–3, note k. The cases will therefore be sent to an assessor, according to the agreement of the parties, to fix the sums which the plaintiffs shall recover in pursuance of the views of the court above expressed.

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ISAAC KEITH *vs.* QUINCY MUTUAL FIRE INSURANCE COMPANY.

If a policy of insurance upon a trip-hammer shop with the machinery therein contains a provision that the policy shall be void if the building remains unoccupied over thirty days without notice, it is not erroneous to instruct the jury that "it is not sufficient to constitute occupancy that the tools remained in the shop and that the plaintiff's son went through the shop almost every day to look around and see if things were right, but some practical use must have been made of the building; and if it thus remained without any practical use for the space of thirty days, it was, within the meaning of the policy, an unoccupied building for that time, and the policy became void."

CONTRACT upon a policy of insurance for one year, dated February 21st 1863, issued by the defendants upon the plaintiff's wooden building in West Sandwich, occupied by him for a trip-hammer shop, and on a water-wheel and the machinery

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therein. The policy contained a provision that "if the building insured remains unoccupied over thirty days without notice, this policy shall be void." The answer set up, amongst other things, that at the time of the alleged fire the building had remained unoccupied for many months.

At the trial in the superior court, before *Lord*, J., a verdict was rendered for the defendants. The plaintiff tendered a bill of exceptions, which the judge refused to allow, certifying that the report was very erroneous in many respects; that the ruling upon the question of occupancy was as given, but in all other respects the bill was so erroneous that it must be disallowed. The ruling upon the question of occupancy was as follows: "It is not sufficient to constitute occupancy that the tools remained in the shop, and that the plaintiff's son went through the shop almost every day to look around and see if things were right, but some practical use must have been made of the building; and if it thus remained without any practical use for the space of thirty days, it was, within the meaning of the policy, an unoccupied building for that time, and the policy became void."

The first count in the declaration was upon an agreement to renew a former policy of insurance upon the same premises, which expired on the day of the date of this policy, and which did not contain the provision requiring the building to be occupied; and the answer denied the making of any such agreement. The plaintiff's bill of exceptions, as tendered, contained a statement of certain facts upon which he contended that this count could be supported, and also of a ruling of the court that he could not rely and recover upon it.

The plaintiff also took some steps towards proving the truth of his bill of exceptions, as tendered to the judge of the superior court; but no additional exception was ever established or allowed.

*F. W. Sawyer*, for the plaintiff. The meaning given by the judge to the word "unoccupied" is erroneous. The true meaning, as applied to buildings, is, "not taken up, vacant, unused." Any substantial use of premises by persons, tools or furniture is an occupancy. *Walker* v. *Furbush*. 11 Cush. 366. This shop

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was no more unoccupied than is a store with goods in it, during the night; a dwelling-house, when the family are away; a warehouse when no goods are coming in or going out; a farmer's barn, full of products; or a school-house during vacation.

*G. Marston*, for the defendants.

DEWEY, J. This case must be decided solely upon the ruling of the court with reference to the clause in the policy, "if the building insured remains unoccupied over thirty days without notice, this policy shall be void." The plaintiff had procured a policy of insurance upon a wooden building occupied by him for a trip-hammer shop. The presiding judge, in reference to the defence set up in the answer that the building had remained unoccupied over thirty days without notice, instructed the jury that "it is not sufficient to constitute occupancy that the tools remained in the shop, and that the plaintiff's son went through the shop almost every day to look around to see if things were right, but some practical use must have been made of the building; and if it thus remained without any practical use for the space of thirty days, it was, within the meaning of the policy an unoccupied building for that time, and the policy became void."

As adapted to the provisions in the policy, we cannot say that these instructions were erroneous. The case presented is only the abstract one of the correctness of the general principle stated, the particular facts of the case not being before us by any allowed bill of exceptions. The presiding judge refused to certify the bill of exceptions as drawn up by the counsel for the plaintiff, and, upon a hearing before this court on the application in behalf of the plaintiff for an allowance of the same, it has only further appeared that the plaintiff offered to prove that the defendant's agent through whom the insurance was effected knew how the trip-hammer shop had been used by the plaintiff in previous years, and that it had always been used from time to time, as the course of the plaintiff's business required trip-hammer and other lighter forging work. But this evidence of such knowledge, if in the case and if unobjectionable otherwise would be immaterial, as the stipulation in the policy alleged to

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have been violated was wholly in reference to the future, and was not to be qualified by any particular previous use of this trip-hammer shop.

The court also properly ruled that the plaintiff could not recover under the first count, setting forth an agreement to insure in a different form. The plaintiff received the policy without objection, and it thus became a valid contract between the parties. He gave notice of his loss under it, and has sought to make it the foundation of a legal claim.

*Exceptions overruled.*

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NATIONAL MUTUAL FIRE INSURANCE COMPANY *vs.* JOHN PURSELL.

A foreign mutual insurance company which has issued a policy to a citizen of this commonwealth, and laid an assessment thereon, without first appointing a general agent here under Gen. Sts. *c.* 58, § 68, may, upon subsequently appointing such agent, maintain an action in this commonwealth to recover the assessment.

CONTRACT brought by a mutual fire insurance company, duly incorporated under the laws of Rhode Island, to recover an assessment laid upon one of its members, a citizen of Massachusetts.

It was agreed in the superior court that the plaintiffs issued the policy to the defendant in Boston, upon an application sent by him to them in Providence; that the assessment was duly laid and notified to the defendant; that after laying the assessment the company for the first time appointed a general agent in Massachusetts, under Gen. Sts. *c.* 58, § 68; and that if the plaintiffs are entitled to recover, judgment should be entered for $31.98, with interest and costs.

Judgment was ordered in the superior court for the defendant, and the plaintiffs appealed to this court.

*A. Richardson & L. W. Osgood*, for the plaintiffs, cited Gen. Sts. *c.* 58, § 72; *Atlantic Ins. Co.* v. *Concklin*, 6 Gray, 73.

*J. H. Butler*, for the defendant.

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Hoar, J. The only point presented at the argument has been the effect upon the liability of the defendant to pay an assessment upon his policy of the failure of the plaintiffs to appoint an agent in this commonwealth, according to the requirement of Gen. Sts. c. 58, § 68. It is agreed that the plaintiffs delivered the policy to the defendant in Boston, which is clearly "doing business in this state" within the meaning of the statute; and that the assessment was duly made and payment demanded. The sum which the plaintiffs shall recover, if the action is maintained, is also agreed.

The section above cited provides that "every foreign insurance company before doing business in this state shall, in writing, appoint a citizen thereof, resident therein, a general agent upon whom all lawful processes against the company may be served." By § 69 the general agent is required, "before any insurance is made by said company," to give a certain bond. It is agreed that the plaintiffs did not appoint such an agent before they issued the defendant's policy, nor until after the assessment was made upon it which is the subject of the action.

If these sections of the statute were all, it is obvious that the action could not be maintained, because the contract of insurance upon which the claim is founded was prohibited by law. But in § 72 it is further provided that "if insurance is made by a foreign insurance company without complying with the requisitions of this chapter, the contract shall be valid, but the agent making the insurance shall be liable to the penalty provided in section seventy-four. And any such company, which neglects to appoint a general agent agreeably to the provisions of this chapter, shall not recover any premium or assessment made by it on any contract of insurance with a citizen of this state until the provisions of this chapter are complied with." This is a material qualification of the preceding sections. The contract is valid; and the liability to assessments is a part of the contract The assessment on the defendant was therefore lawfully made but the company could not sue to recover it until the general agent was appointed. When they appointed him, the disability to sue for and recover the assessment was removed, and the

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action was then allowed by law. The plaintiffs therefore sue upon a valid contract; the statute no longer prohibits the prosecution of the suit; and they are entitled to recover the sum agreed in the statement of facts.

The construction which we give to the statute is confirmed by an examination of the previous statutes from which the sections referred to are in substance taken. These are *Sts.* 1851, *c.* 331, and 1854, *c.* 453. By each of those acts the foreign insurance company was required to appoint a general agent, who should give a bond prescribed, before making any insurance in this commonwealth; but it was also provided that if insurance was made without complying with the requisitions of the act, the contract should be valid, the agent making it being liable to a penalty. It was then provided that if the company should neglect, after notice from the treasurer of the Commonwealth, to appoint a general agent, they should not recover any premium or assessment until the requirements of the act were complied with. This clearly implied that before such notice assessments might be laid, and of course were valid; and that when the agent was appointed they might be collected. The only substantial change in the present law is in striking out the condition of notice by the treasurer. *Judgment for the plaintiffs.*

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JOEL E. GILMAN *vs.* EASTERN RAILROAD CORPORATION.

A railroad corporation is not responsible to a person employed by it to repair its cars, for a personal injury arising from the negligence of a switchman, in failing properly to adjust a switch upon the track over which he is carried by the corporation, free of charge, between his home and the place of his work, provided the corporation has used due care in the selection of the switchman; but if the switchman was an habitual drunkard, and this fact was known or ought to have been known to the corporation, and the injury resulted from his intoxication, the corporation is responsible.

TORT to recover damages for a personal injury.

At the trial in this court, before *Chapman*, J., the plaintiff in his opening stated that he expected to prove the following facts:

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The plaintiff lived in East Boston, and was employed there by the defendants as a carpenter in their repair shop. They afterwards made a bargain with him by which he was to work for them in North Chelsea, which is about four miles from East Boston, in repairing gravel-cars, for a certain sum by the day, and to be carried between East Boston and North Chelsea in the morning, at noon, and after his work was ended at night, free of expense. Nothing was said as to how he should be carried, and he did not know. The plaintiff had no control whatever over the trains. On the day of the injury, which was several months after the parties had entered upon the execution of the contract, the plaintiff was carried from his work at noon to East Boston, upon a flat platform-car, having no seats, sides or railing, pushed by an engine, the tender of the engine being between the engine and the car; and when this train reached East Boston, the platform-car was detached from the tender, while the train was in motion, for the purpose of having the car switched off upon a side track and allowing the tender and engine to follow on a different track to the engine-house. To do this, it was necessary for the switchman to shift the track before the car arrived at the switch, and after this car had passed upon the side track to change the track back again so as to permit the tender and engine to pass upon the main track. The switchman employed by the defendants, when the car was in the proper place, failed to change the switch, but in attempting to do so left the switch about halfway between the two tracks, so that if the car had proceeded its whole length it would have run off the track and exposed the plaintiff to great injury. The brakeman, seeing this, immediately attempted to stop the car, to prevent its running off the track, and greatly and suddenly checked its speed, whereby the tender and engine came upon it, and the plaintiff, who was sitting upon the floor of the car, in the use of due care, was thrown therefrom upon the track, and the tender passed over his right leg, crushing it and rendering amputation necessary. The switchman had been employed at this switch by the defendants for two years immediately prior to said injury, and was of grossly intemperate habits and an habitual drunkard, and was

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grossly intoxicated at the time of the accident, which was the reason why he could not change the switch, and so placed it that the car would have run off the track if it had not been stopped; and, when first employed by the defendants, he had the reputation in the community of East Boston where he lived of being a man of grossly intemperate habits and an habitual drunkard, and while in their employment was drunk every night. The plaintiff, however, had no knowledge of the switchman or his habits till after the accident.

Upon this opening, the judge stated that he was in doubt whether, if these facts were proved, the plaintiff would be entitled to recover; and by consent of parties the case was reserved for the determination of the whole court.

*G. A. Somerby*, for the plaintiff. The defendants by express contract agreed to carry the plaintiff between East Boston and North Chelsea. On his passage between those places, he was not a servant of the defendants, but was a passenger. It was as if he had bought a season ticket. The terms of the contract exclude the idea that he was paid for taking any risk as a servant, engaged in the common purpose of running or managing the train. The defendants were bound to use ordinary care towards him, and failed to do so. The method of carrying him was unsafe, and the employment of a drunken switchman was criminal negligence. The misplacement of the switch was the proximate cause of the injury. *Sherman* v. *Favour*, 1 Allen, 191. *Lund* v. *Tyngsboro*, 11 Cush. 563. *Ingalls* v. *Bills*, 9 Met. 1. The cases heretofore decided in this state have no application to this case, because in each it was either expressly found that there was no contract on the part of the defendants to carry the plaintiff, or else it appeared that the plaintiff was injured without a want of ordinary care on the part of the defendants. See cases cited in the opinion, and also *Nolton* v. *Western Railroad*, 15 N. Y. 444; *Fifield* v. *Northern Railroad*, 42 N. H. 234; *Buzzell* v. *Laconia Manuf. Co.* 48 Maine, 113; *Mellors* v. *Shaw*, 1 Best & Smith, 437; *Roberts* v. *Smith*, 2 Hurlst. & Norm. 213; *Hutchinson* v. *York, &c. Railway*, 6 Railw. & Canal Cases, 588.

*J. G. Abbott & C. M. Ellis*, for the defendants. This case falls

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within the well established rule that one servant of a corporation cannot recover against it for injuries sustained by reason of the carelessness of another servant. See cases cited in opinion. The switchman's fault was not the proximate cause of the injury; and if it were, the neglect in employing the switchman was the neglect of a fellow-servant, and the neglect of the switchman was also the neglect of a fellow-servant. Evidence, therefore, of the switchman's reputation would be incompetent.

GRAY, J.* The case presented by this report is to be determined by the application of rules now too well established to require an elaborate statement of the reasons on which they are founded, or an extended examination of the authorities by which they are supported.

A servant, by entering into his master's service, assumes all the risks of that service, which the master cannot control, including those arising from the negligence of his fellow-servants. In case of an injury to one servant by the negligence of another, it is immaterial whether he who causes and he who sustains the injury are or are not engaged in the same or similar labor, or in positions of equal grade or authority. If they are acting together under one master in carrying out a common object, they are fellow-servants. The master indeed is bound to use ordinary care in providing suitable structures, engines, tools and apparatus, and in selecting proper servants, and is liable to other servants in the same employment if they are injured by his own neglect of duty. But it makes no difference whether the master is an individual or a corporation; in either case, he is responsible to his servants for his own negligence, but not for that of their fellow-servants.

The first attempt to hold a master responsible to one servant for the negligence of another was made in England less than thirty years ago, and was defeated by the judgment of the court of exchequer. *Priestley* v. *Fowler*, 3 M. & W. 1. Not long afterwards a similar attempt was made in this court, with the like result, as announced in an elaborate opinion of the late

* BIGELOW, C. J. did not sit in this case.

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chief justice. *Farwell* v. *Boston & Worcester Railroad*, 4 Met. 49. Many other cases followed in Great Britain, in which the English courts uniformly maintained the same doctrine, but the Scotch judges were less consistent. At last two cases were brought by appeal from the courts of Scotland to the house of lords, there argued by the ablest counsel, and after deliberate advisement and careful examination of all the English and Scotch cases and of the opinion of Chief Justice Shaw, decided, according to the unanimous opinion of Lords Cranworth, Chelmsford, Brougham and Wensleydale, in favor of the master, upon principles of general jurisprudence, applicable alike to England and Scotland. *Bartonshill Coal Co.* v. *Reid & Mc Guire*, 3 Macqueen, 266, 300. In the quaint phrase of the reporter, "Reid and McGuire were both victims of the same accident, which, though melancholy, has settled the law." Ib. 301, *n.*

In this court the rule has been upheld under a great variety of circumstances. A railroad corporation has been held not to be liable to an engineer on a train for an accident from the negligence of a switchman; *Farwell* v. *Boston & Worcester Railroad*, above cited; nor to one brakeman for the negligence of another on a different train; *Hayes* v. *Western Railroad*, 3 Cush. 270. So a woman working in a manufactory cannot maintain an action against the corporation owning it for an injury occasioned by the negligence of the superintendent. *Albro* v. *Agawam Canal Co.* 6 Cush. 75. A railroad corporation has been held not to be responsible in damages for an injury to an apprentice in its machine shop, while acting as fireman on a train, for a defect in a switch, where no want of ordinary care on the part of the corporation was shown; *King* v. *Boston & Worcester Railroad*, 9 Cush. 112; nor to a laborer, employed to repair the road-bed, while being carried to his place of work, by the negligence of those in charge of the train; *Gillshannon* v. *Stony Brook Railroad*, 10 Cush. 228; nor to a carpenter, carried over the railroad to repair its fences, bridges and switch frames, by negligence of the engineer, or of servants whose duty it was to inspect the axles of the cars; *Seaver* v. *Boston & Maine Railroad*, 14 Gray, 466.

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These cases, especially those of *Gillshannon* and *Seaver*, cannot be distinguished in principle from the present. In each of those two, as in this, the plaintiff's work did not begin until his arrival at his destination; and in this, as in those, the work was upon the structures, means or instruments with which the defendants were to carry on their business of common carriers, the workman paid nothing for his passage, and the object of the defendants in carrying him was to get him to his place of work. Risks from the negligence of a switchman, like those from the negligence of the engineer and other servants in charge of the train, must or should have been contemplated by the plaintiff as incident to the employment which he had undertaken. The case of *Russell* v. *Hudson River Railroad*, 17 N. Y. 134, is to the same effect. And the cases in the house of lords, above cited, were actions against a mining company for injuries occasioned to miners, who worked in the mine all day, by the negligence of the man who let them down in the morning and drew them up at night.

The plaintiff was therefore a fellow-servant of the switchman, and not entitled to recover of their common master for any injury occasioned by the negligence of the switchman or other servant in the same employment.

But it is quite as well settled, both in England and America, that a master is bound to use ordinary care in providing his structures and engines, and in selecting his servants, and is liable to any of their fellow-servants for his negligence in this regard. *Tarrant* v. *Webb*, 18 C. B. 797. *Bartonshill Coal Co.* v. *Reid*, 3 Macqueen, 272, 287, 288. *Ormond* v. *Holland*, El., Bl. & El. 102. *Weems* v. *Mathieson*, 4 Macqueen, 215. *Clarke* v *Holmes*, 7 Hurlst. & Norm. 937, affirming *S. C.* 6 Hurlst. & Norm. 349. *Keegan* v. *Western Railroad*, 4 Selden, 175. *Cayzer* v. *Taylor*, 10 Gray, 274. *Snow* v. *Housatonic Railroad*, 8 Allen, 441. The duty of selecting fit servants belongs to the master, whether the master is an individual or a corporation. The same tests of the liability of masters have been applied to corporations as to individuals in the English decisions above cited, and in our own cases, from *Farwell's* in the 4th of Metcalf

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to *Snow's* in the 8th of Allen. To vary the rule in the case of corporations, upon the ground that they must always act by servants or agents, would be to exempt them from liability altogether.

The evidence offered by the plaintiff at the trial was competent to show that the defendants knowingly, or in ignorance caused by their own negligence, employed an habitual drunkard as a switchman, and thereby occasioned the accident. Of the sufficiency of this evidence a jury must judge. If the plaintiff can satisfy them that such misconduct or negligence in the defendants caused the injury, and that he himself used due care, he may maintain his action. *Case to stand for trial.*

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NATHANIEL F. GOLDSMITH *vs.* CHESTER GUILD, JR.

A written contract for the purchase and sale of land within ten days is to be performed within ten days from its date, and not from its delivery, unless so much time has passed before the delivery as to make the performance within that time impossible or unreasonable.

The doctrine that time is not of the essence of a contract in equity should not be applied, as a general rule, to a sale of land in this country.

BILL IN EQUITY to enforce specific performance of a written contract by the defendant, dated March 19th 1864, but not delivered or signed till March 22d, to sell an estate in Boston to the plaintiff, "by good and sufficient deed, with covenant of special warranty against all persons claiming through or under" the defendant, "papers to pass within ten days." The defendant in his answer set forth that he offered to perform the contract within the time specified, but the plaintiff was unwilling to perform on his part, according to the terms of the contract, until the 31st of said March. Evidence was taken, and so much thereof as is material is stated in the opinion; and the case was reserved by *Chapman*, J. for the determination of the whole court.

*L. Child & L. M. Child*, for the plaintiff.

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*O. Stevens*, for the defendant, besides cases cited in the opin ion, cited 1 Sugden on Vend. (7th Amer. ed.) 344; 1 Story or Eq. § 776; *Dominick* v. *Michael*, 4 Sandf. R. 374; *Forrest* v *Elwes*, 4 Ves. 492; *Macbryde* v. *Weekes*, 22 Beav. 533; *Coslake* v. *Till*, 1 Russ. R. 376; *Hipwell* v. *Knight*, 1 Y. & Coll. (Exch.) 416; *Potter* v. *Tuttle*, 22 Conn. 513.

CHAPMAN, J. This bill seeks to enforce the specific performance of a written contract. As it does not allege that the time of performance was extended by parol, the evidence and arguments in respect to such an extension are immaterial. The contract bears date March 19th 1864. Its stipulations are that the defendant shall sell and the plaintiff shall buy the dwelling-house therein described, for the price and on the terms therein specified. The stipulation which gives rise to the present controversy is in the following words: "Papers to pass within ten days." It appears that the defendant did, within ten days from the date of the instrument, prepare a deed for delivery according to the terms of the contract. On the 31st of March the plaintiff tendered performance on his part, and demanded the deed. The defendant refused to deliver it at that time, on the ground that the tender was not seasonably made. Reckoning from the date of the instrument, and excluding the day of the date, the defendant's position that the tender was not seasonably made is right. But though it bears date March 19th, it was not signed and delivered till the 22d; and the tender was made within ten days from that time. The plaintiff contends that the ten days began to run at the time of the delivery, and not at the day of the written date. It is argued on his behalf that the phrase "within ten days" does not refer to the day of the date. But in *Henry* v. *Jones*, 8 Mass. 453, it was held that a note expressed to be payable "in sixty days" must be construed as if it had been expressed "in sixty days from the date." In *Blanchard* v. *Hilliard*, 11 Mass. 85, this construction is affirmed.

If we disregard parol evidence, this must be regarded as a reasonable and proper construction of the contract in this case The phrase "within ten days" obviously means ten days from the date.

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If a contract bears an impossible date, as February 30th, it is otherwise. The time should in such case be reckoned from the date of its delivery. *Styles* v. *Wardle*, 4 B. & C. 908. So if the paper had not been delivered till after the expiration of the ten days, it would be absurd to construe it as ten days from the date, for the performance would then be impossible. But when there is a sensible date, that word in other parts of the deed means the day of the date and not of the delivery. *Styles* v. *Wardle*, *ubi supra*. The same construction ought to be given to the paper if the delivery was so soon that the construction can be reasonably given, because it is in conformity with the written language of the parties. In the present case the delivery was on the 22d of March, and seven days were left for the performance of the contract, which must be regarded as a reasonable time. No authority is produced to sustain the position that in such a case the written date should be disregarded in construing the contract; and the general rule is, that a written agreement shall be so construed, if possible, as to give effect to each part.

The evidence tending to show a readiness on the part of the plaintiff to perform his contract on the 30th and a waiver of time by the defendant, consists of the plaintiff's statement, and it is contradicted by the defendant. If there were proper allegations to make this evidence material, the fact of a waiver would upon this evidence be left in doubt, and would not be established.

But the plaintiff further contends that time was not of the essence of the contract, and that the tender was for this reason in sufficient season, under the circumstances as they appear in evidence.

The strict rule of law in respect to time as an essential part of a contract does not prevail in equity, and the doctrine that "time is not of the essence of the contract" has been applied to many cases. But this doctrine applies to sales of property only in cases where time is immaterial to the value, and is urged only by way of pretence and evasion, and does not apply to a sale of property the value of which is subject to daily fluctuation. *Doloret* v. *Rothschild*, 1 Sim. & Stu. 590. In this country



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time is regarded as more important in respect to the sale of land than in England, because the value of land is more fluctuating here than there. *Hepburn* v. *Auld*, 5 Cranch, 262. *Richmond* v. *Gray*, 3 Allen, 25.

In this case, the evidence tends to show that the property was subject to frequent fluctuations in value on account of the frequent and almost daily fluctuations in the gold market, and that there was an actual change in its value; and we cannot doubt that time was not only an essential part of the contract in fact, but that it was so regarded by the parties when they made their contract. *Bill dismissed.*

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JAMES D. BROWN *vs.* GEORGE N. BIGELOW.

The rule of law that the measure of damages in an action for breach of warranty on the sale of a chattel is the difference between the actual value of the article sold and its value if it had been as warranted, is not affected by proof that the purchaser subsequently resold it for an increased price, especially if it does not appear that such sale by him was without warranty.

A bill of sale of "one horse, sound and kind," is a warranty of soundness, upon which the vendor is liable if the horse proves to be permanently lame, although the purchaser knew that he was lame a week before the sale, and his lameness was talked of before the sale, and the vendor then refused to give a warranty.

CONTRACT to recover damages for a breach of warranty of a horse.

At the trial in the superior court, before *Ames*, J., it appeared that the plaintiff and John Adams examined and tried the horse; that on the following day the plaintiff bought him, paying the sum of four hundred dollars by a check of Adams, and taking from the defendant a bill of sale, which contained the words "one chestnut horse, nine years old, sound and kind;" that the plaintiff, after ascertaining the price for which he could buy the horse of the defendant, bargained him to Adams, who undertook to pay and did pay to the plaintiff four hundred and twenty-five dollars in money and another horse worth about seventy-five dollars; and that the plaintiff, after making this bargain with

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Adams, completed his contract with the defendant. It did not appear whether the plaintiff warranted the horse to Adams, or whether he had ever paid or been called upon to pay anything to him. There was evidence to show that the horse was permanently lame. On these facts, the defendant requested the court to rule that the plaintiff could only recover nominal damages; but this request was refused.

The defendant then proved that the horse was lame when the plaintiff and Adams examined him, and that they were then informed by the hostler that he had been lame a week before; and the plaintiff, upon seeing the defendant, said, "I like him first rate, but he is lame some;" to which the defendant answered, "Yes, I told you so;" and the plaintiff then said, "I must have a warranty," and the defendant refused to give one. The bill of sale was made afterwards, the body of it being in the plaintiff's handwriting, and there was no evidence of anything that was then said between the parties.

The defendant contended, upon this evidence, that the jury might find that the word "sound" in the bill of sale was not a warranty against this particular lameness; but the judge instructed the jury that the terms of the bill of sale were a warranty that the horse had no permanent or incurable lameness or other defect, and that under the bill of sale, no question being raised as to its execution, the only question for the jury was as to the amount of damages; and that the damages which the plaintiff would be entitled to recover would be the difference between the value of the horse if he had been sound and his actual value at the time of the sale.

The jury returned a verdict for the plaintiff, with $250 damages; and the defendant alleged exceptions.

*T. H. Sweetser & J. Nickerson*, for the defendant.

*S. J. Thomas*, for the plaintiff.

Bigelow, C. J. The rule of damages for a breach of warranty on the sale of chattels is well settled and familiar. It is the difference between the actual value of the article sold and the value of the same article if it had been such as the vendor warranted it to be. *Stiles* v. *White*, 11 Met. 358. *Tuttle* v

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*Brown*, 4 Gray, 460. The application of this rule is not changed or modified by the fact that a purchaser of a warranted article has sold it for the same or even a greater price than that which he paid for it. *Medbury* v. *Watson*, 6 Met. 257. We doubt very much whether this rule of damages would be affected by proof that the article purchased with warranty was bought, as in the case at bar, for the purpose of being delivered to a third party under a previous contract of sale, even if such resale was made by the original vendee without warranty, so that no loss or liability whatever would be incurred by him. The disposition which a purchaser makes of property is an independent and collateral fact, having no connection with the bargain by which he acquired his title. It is difficult to see how it can have any legitimate bearing on the damages which another person ought to pay him for a breach of a wholly distinct and separate contract. But if such evidence is competent, it ought to appear affirmatively that the resale was made by the original vendee on terms such as would preclude him from any loss or damage by reason of the breach of warranty by the original vendor. No such evidence was offered on the trial of this case. For aught that appears, the plaintiff may have in his turn given a warranty to the person who bought the horse of him, for a breach of which he may be liable in damages. As the case stood, there was nothing shown to take it out of the ordinary rule of damages where there has been a clear breach of warranty.

The construction of the written contract of warranty was exclusively for the court, and it was rightly interpreted to be a general warranty of the soundness of the animal. The doctrine that such a warranty does not include or cover patent and obvious defects, which are plainly visible to a purchaser, has no application to a case such as was proved at the trial, but only to one where it appears that a horse has been sold having a palpable defect, constituting unsoundness, such as the loss of an eye which could not have escaped the observation of the purchaser The doctrine rests on the reasonable presumption that the parties could not have intended the warranty to apply to a defect rendering the horse unsound which was seen and known to both

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parties at the time of sale. But here the appearance of the horse did not disclose actual unsoundness. The unsoundness was not patent. Lameness may or may not make a horse unsound. If it was only accidental and temporary, it would not be a breach of warranty; but if it was chronic and permanent, arising from causes which were beyond the reach of immediate remedies, it would be clearly a case of unsoundness. In the case at bar, the evidence shows that the cause of the lameness was doubtful and obscure, and that its nature and the probability of its continuance were unknown to the purchaser. The reasonable inference is, that the warranty was intended to guard against the danger of loss in the event that the lameness proved to be serious and permanent. It is the very case in which a purchaser ought to be protected by a warranty.

*Exceptions overruled.*

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JOSIAH Q. BRIGHAM *vs.* SAMUEL O. MEAD.

One who sells shares of the capita stock of a corporation which has not yet issued certificates, and agrees to give the purchaser a certificate when he gets it, is not bound to pay an assessment laid upon the shares thereafter, and before the certificates are issued.

CONTRACT. The first count of the declaration alleged that on the 11th of March 1863 the defendant sold to the plaintiff four hundred shares of the Vale Copper Company, for which the plaintiff gave to the defendant five hundred dollars, and took from the defendant the following agreement, signed by the defendant: "Sold to J. Q. Brigham four hundred shares Vale Copper Company stock, and he has paid me five hundred dollars for the same, and I am to give him a certificate when I get the same." This count further alleged that the defendant has had the certificates, but though often requested has refused to give the same to the plaintiff.

The second count was for five hundred dollars, had and received.

It was agreed, in the superior court, that the purchase was

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made as averred, and the written memorandum made, nothing being then said about any assessment upon the shares; that an assessment of twenty-five cents upon each share was made on the 1st of April 1863; that the defendant has never received the certificate, and cannot get it without paying to the company the amount of the assessment, and offered to give to the plaintiff the certificate upon payment of the assessment, and also offered and now offers to assign his right in the shares to the plaintiff. The certificates were not issued till the autumn of 1863.

On these facts, judgment was rendered for the defendant, and the plaintiff appealed to this court.

*J. Nickerson*, for the plaintiff.

No counsel appeared for the defendant.

CHAPMAN, J. The agreed statement of facts does not show that the defendant made a sale of stock which he did not own. On the contrary, it is to be inferred that he did own it at the time of the sale, on the 11th of March 1863. The fact that the company were not then prepared to issue certificates of stock, and did not actually issue them until some months afterwards, does not affect the question of ownership. The objection that the sale was void on the ground that it was contrary to Gen. Sts. *c.* 105, § 6, which prohibit the sale of stocks by persons who are not owners thereof or authorized by the owners to sell the same, is not valid. The object of the statute was to prohibit gambling in stocks, and not to prohibit the *bona fide* sale by the real owners, merely because the company had not so far perfected its arrangements for business as to be prepared to issue certificates.

The company did not issue certificates till the autumn after the contract was made. At that time an assessment had been laid upon the shares, and each proprietor must pay it before the company would issue a certificate to him. The principal question in this case is, whether it was the duty of the seller or the purchaser to pay the assessment. We think it was the duty of the purchaser. It does not appear that the assessment was payable or had been laid at the time of the sale; and in the absence of any express stipulation, the property must be understood to

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pass in the condition in which it was at the time of the sale. The duty of the vendor would be fulfilled if he discharged all such incumbrances as existed at that time. The transfer of the property as between the parties was effected by the bill of sale. The purpose of a certificate is not to make the transfer, but to furnish a species of evidence of a transfer which has already taken place between the parties. It is important for several collateral purposes; but not for the purpose of a transfer as between the parties. The issuing of a certificate is not the act of the vendor, but of the corporation. The payment of the assessment properly belongs to the plaintiff, because it was laid upon the stock after he became the owner. *Judgment for the defendant.*

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EDWARD S. CANNON *vs.* FRANCIS O. LEONARD.

If an amendment is allowed to a plaintiff upon terms which are not complied with, and the case is nevertheless submitted to the jury without objection, the defendant cannot, after a verdict for the plaintiff, object to this course of proceedings; especially if the court order that judgment be not entered till the terms are complied with.

CONTRACT to recover for goods sold and delivered.

At the trial in the superior court, before *Ames*, J., the plaintiff obtained leave to amend his writ by joining another person as a plaintiff with him, on terms which were not complied with by the plaintiff. Nevertheless the case was given to the jury with the amendment, without objection on the defendant's part, and a verdict was returned for the plaintiff. The court afterwards ordered that the plaintiff comply with the terms before judgment should be made up or entered. The defendant alleged exceptions.

*S. Tompson*, for the defendant.

*W. C. Williamson*, for the plaintiff, was not called on.

BIGELOW, C. J. The allowance of the amendment was within the discretion of the judge. The defendant, by going on with the trial without insisting on an immediate compliance with the

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terms imposed by the court as a condition of the allowance of the amendment, waived any ground of objection to the proceedings and to the verdict, founded on the failure of the plaintiff to conform to the order of the court. All that the defendant could properly ask under the circumstances was, that the plaintiff should have no benefit of the verdict, until he had complied with the terms prescribed by the court. This was granted to him by the order of court staying judgment till such compliance was had. *Exceptions overruled.*

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BERNARD H. LEE & wife *vs.* GEORGE L. GIBBS.

Under the *St.* of 1863, *c.* 180, § 2, modifying the 34th rule of the superior court, it is necessary for a party in that court to allege exceptions orally, if not in writing, to the rulings, charge or instructions of the judge, before the retirement of the jury.

IN this case, which was an action of tort, the plaintiffs' exceptions were disallowed by *Lord*, J., in the superior court, because the same were not taken or saved before verdict, although they were reduced to writing and tendered after verdict, and were found conformable to the truth. To this refusal to allow the exceptions, the plaintiffs excepted.

*F. A. Brooks*, for the plaintiffs.

No counsel appeared for the defendant.

METCALF, J. The thirty-fourth rule of the superior court requires that "all exceptions to any charge to a jury shall, unless previously saved, be alleged in writing before the jury are sent out, and if not so alleged, the same shall not be allowed." And that court was authorized by the Gen. Sts. *c.* 115, § 4, to make the rule. But the plaintiffs contend that this rule is annulled by *St.* 1863, *c.* 180, § 2, which provided that "in the trial of any cause before a jury, neither party shall be required to allege his exceptions in writing to the rulings, charge or instructions of the presiding justice before the jury retire to consider the cause.' The court, however, are of opinion that this statute was not

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intended, and has not the effect, to allow a party to delay the alleging of exceptions until after the jury have retired, but that it merely excuses him from alleging them thus early "in writing." As they were not, in this case, alleged either in writing or orally before the jury retired, the court rightly refused to allow them, although they were found conformable to the truth. See *Joannes* v. *Underwood*, 6 Allen, 242. *Exceptions overruled.*

HARRIET M. SHANNON *vs.* OLIVER N. SHANNON.

If this court are equally divided in opinion upon a question presented on a bill of exceptions, the exceptions are overruled; and if, in such a case, exceptions have been overruled, no exception lies to the refusal of a single judge to postpone the entry of judgment, and to allow the case to go again before the whole court, on a motion for a re-argument.

LIBEL for divorce. At the trial in this court, the jury returned a verdict for the libellee, and the libellant alleged exceptions, which were argued before the full court, and the following rescript was entered: "The court being equally divided in opinion, the exceptions are not sustained." Thereupon the libellant presented her petition to the justices of this court, praying that judgment might be arrested, and a re-argument allowed upon the exceptions; but, on motion of the libellee, judgment was entered in his favor, and the petition of the libellant refused; and she alleged exceptions.

The case was submitted by the libellee without argument.

H. M. Shannon, *pro se.*

DEWEY, J. 1. The order of the full court, contained in the rescript filed in the case, had already declared the legal effect of an equal division of the members of the court as to the legal questions raised on the bill of exceptions. In our practice, in such a case, the exceptions are not sustained *Durant* v. *Essex Co.* 8 Allen, 103.

2. The application to the court holden by a single judge, to postpone entering a judgment, for the purpose of affording the

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party an opportunity for a re-argument upon a case already decided by the full court, was a matter within the discretion of the judge, and his ruling refusing such application does not furnish any ground for a bill of exceptions.

*Exceptions overruled.*

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DANIEL DESMOND *vs.* ARTHUR F. L. NORRIS.

An innocent omission to cancel a revenue stamp upon a promissory note in the mode prescribed by statute is no ground of defence to an action upon the note.

CONTRACT upon a promissory note signed by the defendant and dated March 5th 1864.

At the trial in the superior court, before *Lord*, J., without a jury, the note was produced in evidence by the plaintiff and had upon it a United States revenue stamp, which was cancelled in this form: "A. F. L. N. 5. 1864." The defendant objected to the introduction of the note in evidence, because the stamp was not duly cancelled; but the judge overruled the objection, and found for the plaintiff. The defendant alleged exceptions.

*N. Richardson*, for the defendant.

No counsel appeared for the plaintiff.

BIGELOW, C. J. The defect in the mode of cancelling the revenue stamp on the note is not a valid ground of defence. The mode of cancellation prescribed by the act of congress, U. S. St. of 1862, *c.* 119, § 99, is directory only. No penalty is provided for an innocent omission to comply with the requirements of the law in this particular. It is only when such omission is fraudulent, that the guilty party is subject to a fine. Whether such fraudulent omission by a promisor would be a good ground of defence to a note, we have no occasion to determine. It is sufficient for the decision of this case that it does not appear that there was any wilful violation of law.

*Exceptions overruled.*

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JOHN D. BATES & another *vs.* BOSTON AND NEW YORK CENTRAL RAILROAD COMPANY & others.

A fac-simile of the seal of a corporation printed upon blank forms of obligations prepared to be executed by the corporation at the same time when the blank is printed and by the same agency is not a seal, at common law, nor will such forms, when executed by the corporation, be contracts under seal, although the language of them calls for a seal.

The St. of 1855, *c* 223, providing that the mere impression of the seal of a corporation upon any legal instrument executed by such corporation shall thenceforth be valid, is not retrospective in its operation.

BILL IN EQUITY filed August 1st 1861, and alleging, amongst other things, that on the 13th of March 1852 the Norfolk County Railroad Company, a corporation which then owned certain real and personal property, being indebted to the plaintiffs, executed and delivered to them certain bonds, a copy of one of which was annexed, similar in form, and under the seal of the corporation, payable January 1st 1854, which constituted valid obligations in favor of the plaintiffs against the corporation; that the plaintiffs are still the holders thereof; that afterwards, under the authority of different acts of the legislature, the Norfolk County Railroad Company united with other railroad companies and became a corporation under the name of the Boston and New York Central Railroad Company, which new corporation took the property of the Norfolk County Railroad Company subject to the trust and obligation to apply the same, so far as necessary, to the payment of the debts of that company; and the prayer was that the new corporation and its officers might be compelled so to apply the said property.

The instrument referred to as a bond of the Norfolk County Railroad Company, was as follows: "Norfolk County Railroad Company. $*112*. Due January 1, 1854. No. *8*. Be it known that there is due to the holder of this Certificate *one hundred* and *twelve* Dollars, for value received, to be paid at the Office of the Treasurer of the Norfolk County Railroad Company in Boston, on the first day of January One Thousand Eight Hundred and Fifty-Four, with interest payable semi-annually, from the first day of January A. D. 1852, on presentation of th

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corresponding interest warrant hereunto annexed. In witness whereof, and pursuant to a vote of the Directors of said Com pany, the Treasurer has signed this Certificate, and affixed the seal of the Corporation, this thirteenth day of January, One Thousand Eight Hundred and Fifty-Two; and the President has countersigned the same. *Edward Haynes, Jr.* Treasurer. *Welcome Farnum*, President." A printed form was used for the above instrument, the portions which are here printed in italics having been written in; and a printed impression in the form of a seal was also upon it.

The parties agreed that when these instruments were issued "there was impressed upon each and all of said papers, on the paper thereof, the corporate seal of said Norfolk County Railroad Company; the defendants contend however that said act does not make said papers sealed instruments, and that said impression is not a seal;" and that said papers were issued by the proper officers of the company, as an execution of a certain vote of the company, authorizing the treasurer "to give the notes or bonds of the company for any other liabilities of the company." Certain other facts were also agreed, which are now immaterial.

The case was reserved by *Metcalf*, J. for the determination of the whole court.

*C. T. Russell*, for the plaintiffs, cited Gen. Sts. *c.* 3, § 7, *cl.* 15; *Tasker* v. *Bartlett*, 5 Cush. 359, 364; *Mill Dam Foundery* v. *Hovey*, 21 Pick. 417; *Bradford* v. *Randall*, 5 Pick. 496; *Commonwealth* v. *Griffith*, 2 Pick. 11; Sugden on Powers, (8th ed.) 232; *The Queen* v. *St. Paul*, 7 Q. B. 232.

*H. W. Paine & S. W. Bates*, for the defendants, cited, in addition to cases cited for the plaintiffs, 4 Kent Com. (6th ed.) 452; *Warren* v. *Lynch*, 5 Johns. 239; *Coit* v. *Milliken*, 1 Denio, 376; *Bank of Rochester* v. *Gray*, 2 Hill, 227; *Farmers' & Manufacturers' Bank* v. *Haight*, 3 Hill, 493.

Dewey, J. The plaintiffs seek by means of this bill, to enforce payment of certain certificates of indebtedness given to them by the Norfolk County Railroad Company. As the foundation of the bill, it becomes necessary to establish the fact of a present existing indebtedness to them on the part of the

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company. This they attempt to do by the production of certain instruments bearing date January 13th 1852, and signed by the treasurer and the president of the company, acknowledging such indebtedness, and promising to pay the same with interest semi-annually, on the first day of January 1854, the form of which certificates is fully set forth in the bill.

The defendants interpose the statute of limitations as a bar to any right on the part of the plaintiffs to enforce the payment of these bonds. By the Gen. Sts. *c.* 155, actions of contract founded upon any contract or liability not under seal, except such as are brought upon a judgment or decree of some court of record of the United States, or of this or some other of the United States, shall be commenced within six years next after the cause of action accrues. Unless the exception as to contracts "under seal" applies to these certificates, they are clearly barred, as they became due and payable on the 1st of January 1854, and no action was commenced within six years from that date. But the plaintiffs insist that the contracts they now seek to enforce are under seal, and so are embraced in the exception clause. The Rev. Sts. *c.* 120, § 1, have provisions similar to the Gen. Sts., and it is the former that are applicable to this case, if any, as the six years' limitation had taken effect before the Gen. Sts. went into operation. The character of these contracts in a legal point is to be determined by the law as it existed when the contracts were made. To decide what constitutes a contract under seal, as applicable to this case, we must resort to the common law doctrine as held in Massachusetts at that time, for we had then no statute as to what should constitute seals in cases of personal contracts. We had a provision as to seals of the courts and public offices, where the same were required by law, declaring as to such cases that the word "seal" should be construed to include an impression of such official seal made upon the paper alone, as well as an impression made by means of a wafer or of wax affixed thereto. Rev. Sts. *c.* 2, § 6. This authority, confined as it was to courts and public offices, yet obviously contemplated something more than a printed impression upon the instrument made by the printer in connection with the

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printing of the blank writ or certificate. The common law doctrine as to a seal was, that there must be a wafer or wax, or some other tenacious substance capable of receiving the impression of a seal made upon it. It was so assumed in *Commonwealth* v. *Griffith*, 2 Pick. 18; *Bradford* v. *Randall*, 5 Pick. 496; and *Tasker* v. *Bartlett*, 5 Cush. 364. It was fully considered and settled in New York, in the case of *Warren* v. *Lynch*, 5 Johns. 239, and recognized in *Farmers' & Manufacturers' Bank* v. *Haight*, 3 Hill, 493, and other cases. The theory of the purpose of seals, as expounded by Kent, C. J., in *Warren* v. *Lynch*, was, that it required greater ceremony and solemnity in the execution of important instruments, by means of which the attention of the parties is more certainly and effectually fixed.

So well settled has the law been in this respect that no one, we suppose, doubts as to the nature of the seals required upon contracts made by individuals. The practice that has recently prevailed of making a printed impression purporting to be a seal on contracts of corporations, as a substitute for the common law seal, has with us no legal foundation or authority, except so far as it has been sanctioned by our statutes. The attempt to make a substitute for the common law seal in the present instance was a greater departure than that of impressing the actual seal of the corporation upon paper alone. This was the mere printing of a fac-simile of the seal at the same time and by the same agency as the printing of the certificates, to be afterwards signed by the president and treasurer. As to the seal, nothing was left to be done by the officers of the corporation, who alone were authorized to affix the corporate seal. This practice is certainly in derogation of the whole theory of sealing contracts. It was the fact that the obligor did two independent acts, first, that of signing, and secondly, that of sealing, that in the theory of the law gave so much more solemnity to the contract, and imported so much greater deliberation, and therefore entitled it to be enforced without any proof of a particular consideration or recital that it was for value received, as well as extended its vitality beyond the period of six years, and excepted

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it from the bar incident to all personal contracts which were merely signed by the promisor.

We were referred by the counsel for the plaintiffs to Sugden on Powers, (8th ed.) 232, as sustaining the form of seal here used; but upon examination of that treatise, we think it fails so to do. While the writer holds that it is not necessary to use wax or a wafer, though citing no authorities for this opinion, he clearly rejects the case of a seal impressed by blocks or types in connection with the printing of the instrument that is to be the contract when duly executed by the properly authorized officer of the corporation, stating that in the execution of a deed there are required three distinct acts: 1. The determination in the mind to do the act. 2. The signing of the instrument. 3. The sealing. As to the latter, he says: "If the seal, stick or other instrument used be impressed by the party on the plain parchment or paper with intent to seal it, it is clearly sufficient." This is undoubtedly a modification of the common law doctrine of a seal, as we have it in 3 Inst. 169, and as the same has been understood in this commonwealth; but even this does not give validity to any such form of sealing as was adopted in these certificates. The statement of Mr. Sugden as to the presumption of a seal where it is recited in the deed to have been sealed, that it will, in the absence of evidence to the contrary, be presumed to have been sealed, although no impression appear on the parchment or paper, if correct, (but as to which we have the authority of Kent, C. J., citing Perkins, § 129, to the contrary, in the case of *Warren* v. *Lynch*, 5 Johns. 239,) would not aid the present case, because here no presumption arises, as all that was done is visible to the eye and remains unchanged. If that which appears on the instrument is not a seal, we have no right to presume that the instrument was sealed.

The case of *The Queen* v. *St. Paul*, 9 Jur. 442, *S. C.* 7 Q. B. 232, cited by the plaintiffs, is in some respects more favorable to them, as the objection there taken to the seal was, that it was an impression made by means of a wooden block. That case arose upon an appeal from an order of certain justices, for the removal of one T. H. Other objections to sustaining the

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order were also taken, and they were held sufficient, irrespective of that as to the seal. As to that, the court say: "We do no wish there should be any doubt upon the point as to the validity of the seal. We seal in this way; but we hold the order bad on another ground." This was a judicial process, and the remarks as to the seal were with reference to judicial processes, and not applied to cases of personal contracts. We know that to some extent such practice has prevailed as to judicial processes in those states where the common law rule has been held strictly as to the seals of individuals. We are also aware that in many of our sister states a different rule prevails, as to what is necessary to constitute a sealed contract, from that which has been uniformly held in Massachusetts. In some of them this is founded upon statute provisions, and in others upon long usage, recognized by judicial decisions. But, in the absence of any such statute or usage, the scroll, whether made by a pen or types, does not change the character of the instrument from a simple contract to one under seal, or give it the legal effect of importing a consideration when none is expressed, or extending the statute of limitations from the period of six to twenty years. Such contract is entitled to all the binding effect upon the promisor that a contract not under seal has, and nothing more. In the present instance, the contract recites that it is given "for value received," and assumes in that respect the form of a promissory note rather than a bond.

Our course of legislation fully confirms the opinion that this was the well understood law with us. It was because this was so that the various statutes modifying our common law in this respect have been adopted; and the further inquiry is, whether, by force of any statute, these certificates may be deemed contracts under seal. Clearly no such statute existed at the time of their execution and delivery. The earliest statute on the subject was that of 1855, *c.* 223. But that statute was not retrospective, or applicable to instruments previously executed. It cannot be so construed as to affect contracts which were made before its enactment. *North Bridgewater Bank* v. *Copeland*, 7 Allen, 139, and cases there cited.

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The *St.* of 1855, *c.* 223, was repealed before the institution of this suit, and was succeeded by the provisions of Gen. Sts. *c.* 3, § 7. This latter statute does not aid the plaintiffs, if it shall be deemed broad enough to embrace the cases of contracts by corporations, for the further reason that these contracts had been already absolutely barred by the statute of limitations, Rev. Sts. *c.* 120, § 1, before the Gen. Sts. went into operation, and the Gen. Sts. cannot be construed to have the effect to remove the bar, and revive them as valid contracts. These instruments are not therefore to be construed as contracts under seal by the rules of the common law, as held by this court at the time of their execution and delivery. This leaves them to be treated as simple contracts, liable to be barred by the lapse of six years after they fell due, without any attempt to enforce them. The right of the creditors to enforce these claims, so far as they have any, accrued on the day the debts became due, and the period of six years' limitation would commence at that date.

Although this is a proceeding in equity, yet the court will equally apply in a proper case the statute of limitations. *Farnam* v. *Brooks*, 9 Pick. 212. *Baker* v. *Atlas Bank*, 9 Met. 195. *Commonwealth* v. *Cochituate Bank*, 3 Allen, 50.

The result is, therefore, that the plaintiffs have failed to establish any legal indebtedness to them, on the part of the Norfolk County Railroad Company, existing at the time of filing this bill.

The present was peculiarly a case where these creditors should have early enforced their rights against the property of the Norfolk County Railroad Company, in the hands of the Boston and New York Central Railroad Company. But the plaintiffs, instead of promptly availing themselves of their rights in this respect, wholly neglected to enforce them, and permitted the property, so far as any remained, to pass to another company, and as against this latter company, delayed attempting to enforce these claims until January 1861, being a period of more than seven years after the debts matured. The defence thus taken is well maintained, and the bill must be dismissed.



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## Chloe A. Hill *vs.* John S. Keyes.

An attachment of property is not dissolved by proceedings in insolvency against the debtor which are suspended before an assignment is executed.

If a judgment is erroneous by reason of a defective service of the writ upon the defendant, and also because the defendant was an infant who had no guardian, and no guardian *ad litem* was appointed, he upon coming of full age may execute a written release of errors, which will have the effect to confirm the judgment.

In an action against an officer to recover for his failure to apply on an execution the property which was attached on the writ, he cannot set up that the judgment was erroneous, if the judgment debtor has released the errors therein.

Tort against the late sheriff of Middlesex to recover damages for the failure of his deputy, Elijah Winship, to apply on an execution, issued upon a judgment recovered by the plaintiff against Newell F. Onion, the property which was attached on the writ. At the trial in the superior court, before *Morton*, J., without a jury, judgment was rendered for the plaintiff, upon facts and rulings which sufficiently appear in the opinion; and the defendant alleged exceptions.

*C. R. Train & A. Hemenway*, for the defendant.

*J. Nickerson*, for the plaintiff.

Metcalf, J. The court find no ground for the support of these exceptions. The defendant's deputy, Winship, attached the property of Onion on a writ sued out against him by the plaintiff, (then named Chloe A. Farris,) and afterwards attached the same on two other writs, one sued out by Josiah Tisdale, and the other by James P. Bridge. Proceedings in insolvency were soon after instituted against Onion, by some other or others of his creditors, which were nullified by this court. *Farris* v. *Richardson*, 6 Allen, 118. From the papers and records in the aforesaid insolvency proceedings, which are made part of this bill of exceptions, it appears that the judge of insolvency issued a warrant to said Winship, as messenger, directing him to take possession of Onion's property; that no further proceedings against Onion were had by said judge, he having been prevented, by an injunction from this court, from proceeding further As no assignment of Onion's property was made by the judge

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of insolvency, the attachments thereof were not dissolved; Gen. Sts. *c.* 118, § 44, and Winship continued to hold the attached property subject only to his duty and liability as attaching officer.

While the question was pending whether the proceedings in insolvency against Onion should be annulled, Winship was authorized by this court, on an agreement of the plaintiff and other creditors of Onion, to sell, at public or private sale, such part of Onion's property in his hands as deputy sheriff or messenger, as would be liable to depreciate in value, &c., and to hold the proceeds thereof "to await the final order of the court, to be ultimately applied according to law." He sold the property accordingly, and now holds the proceeds.

The plaintiff recovered judgment against Onion in her suit on which her attachment was made, took out execution thereon, and duly demanded of Winship, and also of the defendant, payment thereof from the money received on the aforesaid sale. Since this action was commenced, Tisdale and Bridge, the two other attaching creditors of Onion, became nonsuit in their actions against him, on his having proved the defence of infancy; and thereby their claims on the attached property were extinguished.

On these facts, the court are of opinion that the plaintiff is entitled to so much of the money in Winship's hands — if there be so much — as will satisfy her execution against Onion. We see no other way in which the proceeds of the sale of his property are to be "applied according to law," but by applying them in payment of the plaintiff's execution.

It is objected in behalf of the defendant, that the plaintiff's judgment against Onion was erroneous, by reason of a defective service of the writ upon him, and because, he being an infant, a guardian *ad litem* for him was not appointed. But he, since he came of age, has given to the plaintiff a release of errors in her suit against him. And the defendant can not sustain the objection that Onion was an infant when he became the plaintiff's debtor and might have defeated her action by setting up his infancy as a defence. He had a legal right to defeat

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Tisdale's and Bridge's actions, on the ground of infancy, and to consent that the plaintiff might have judgment against him, his infancy notwithstanding. The privilege of an infant to avoid his contracts is personal, of which only he, his executors or administrators, and his privies in blood, can take advantage. Macpherson on Infants, 478. *Smith* v. *Mayo*, 9 Mass. 62. *Hoyle* v. *Stowe*, 2 Dev. & Bat. 322, 323. *Kendall* v. *Lawrence*, 22 Pick. 543. *Exceptions overruled.*

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WILLIAM BUNTON *vs.* JOHN RICHARDSON.

If an estate which is occupied by a tenant at will is sold by the owner, and the tenant remains in possession thereof after notice of the sale, he is liable in an action of contract for rent to the purchaser, under Gen. Sts. c. 90, §§ 25, 26.

CONTRACT brought to recover the rent of a tenement in Boston.

It was agreed in the superior court that on April 20th 1864 the defendant was in possession of the premises as tenant at will to one Tirrell, who on that day conveyed the same to the plaintiff; and the plaintiff at once gave notice thereof to the defendant and exhibited to him the deed, and requested him to vacate the premises. The defendant however continued to occupy the same for the time stated in the declaration.

On these facts, judgment was rendered for the plaintiff; and the defendant appealed to this court.

*J. Brown*, for the defendant.

*T. F. Nutter*, for the plaintiff.

BIGELOW, C. J. On familiar and well settled principles, the conveyance by the owner of the premises occupied by the defendant terminated the tenancy at will, and the latter thereby became tenant by sufferance only. At common law, such tenant would not be liable to the new owner for rent of the premises after such conveyance, without attornment or a new contract for the payment thereof. But such liability is expressly created by Gen. Sts. c. 90, §§ 25, 26. We see no reason why

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these provisions are not applicable to cases like the one at bar The statute creates the privity and gives the cause of action.

*Judgment for the plaintiff.*

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## Tremont Improvement Company *vs.* Boston Water Power Company.

The right of the Boston and Roxbury Mill Corporation, under *St.* 1814, *c.* 89, § 2, to maintain the canal and dike therein authorized was not taken away by *St.* 1833, *c.* 120, annulling their right to build a dam from Boston to South Boston, or by their release to the Commonwealth in 1854 of lands and flats in the "empty basin."

Gray, J. This is an action of tort to recover damages for the obstruction of an ancient natural watercourse, called Smelt Brook, which formerly divided Roxbury from Boston.

The Boston and Roxbury Mill Corporation were authorized by their charter to build a dam from Boston westwardly to Brookline, since known as the Mill Dam, and a cross dam thence to Gravelly Point in Roxbury, so as to inclose the tide water in Tide Mill Creek on the northwest of the cross dam, and form an empty basin between these two dams and Boston Neck; and also to build another tide dam from Boston to South Boston, to connect by a canal Tide Mill Creek with the basin so formed, and to "raise the banks of said canal, and dike the borders of the marshes on the easterly bank of said creek, so as to prevent the tide from flowing at any time into the empty basin;" paying such damages to any party injured as should be estimated by a committee, or by a jury. *Sts.* 1814, *c.* 39, §§ 2, 6; 1816, *c.* 40; 1819, *c.* 65. Before 1820 the Boston and Roxbury Mill Corporation built the Mill Dam and the cross dam, and dug the canal and made a dike from Gravelly Point southwestwardly to Boston Neck, and thus diverted the waters of Smelt Brook from the empty basin, into which they had previously flowed, and caused them to flow into the full basin; and under the alleged authority of this charter the dike was maintained by that corporation until 1832, and by their grantees, the

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defendants, from that time until the bringing of this action. The right to build a dam between Boston and South Boston was never exercised, and was annulled by *St.* 1833, *c.* 120.

The plaintiffs, who are the owners of land on both sides of Smelt Brook, contend that this statute took away the right to maintain either the canal or the dike connecting the cross dam with the proposed South Boston Dam. The defendants on the other hand contend, and, as we think, with reason, that this dike was intended not only as a bank to the canal, but also to prevent the waters of Tide Mill Creek from flowing into the empty basin; and that the right of maintaining the dike already built therefore continued after the passage of the *St.* of 1833.

The plaintiffs further contend that the defendants have lost this right by their release in fee to the Commonwealth in 1854 of lands and flats in the empty basin and of their right of flowage. But this release was limited by the terms of the indenture executed by the Commonwealth and the defendants thus: "so far as to allow the Commonwealth to fill up" such flats; and provided for the keeping up by the defendants of the regular flow of the tide water through the full and empty basins until the whole of the land and flats in the empty basin should be filled up or until the defendants should surrender their mill franchise, neither of which had been done when this action was brought.

As it appears from the facts agreed by the parties that the defendants at the date of the writ had the right to maintain the dike complained of, there must be

*Judgment for the defendants.*

*F. A. Brooks*, for the plaintiffs.

*G. O. Shattuck*, for the defendants.

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ZABDIEL A. WILLARD & others *vs.* MARY G. WARE & others.

If a testator, after disposing of all his estate by will, conveys land in trust for his six children and their issue, and in case of their death without issue then for his heirs, reserving to himself full power to alter the trusts by deed or will; marries a second wife; loses one child; and subsequently makes a codicil to his will, giving to his wife "in fee simple one sixth part of the whole estate and property, real, personal and mixed, whereof I die possessed, it being my intention to give to her what would be her legal share if she were one of my children," and ratifies and confirms his will in all respects in which it is not qualified by the codicil; and if in the will and deed of trust he has preserved equality among his children; this codicil will operate as an execution of the power of disposal, which the testator reserved to himself, of the estate conveyed by the deed of trust, and his widow will be entitled to one sixth of his whole estate, and the other five sixths will be disposed of according to the directions of the will, irrespective of the deed of trust.

BILL IN EQUITY by the trustees under the will, and also under a deed of trust, of John Ware, deceased, seeking for instructions as to the proper execution of the trusts.

The bill set forth the following facts: On the 27th of February 1860 John Ware conveyed to trustees (two of the present plaintiffs being two of the said trustees, and the third plaintiff being successor of the third trustee, who has since died) one undivided quarter part of certain real estate in Boston, in trust, to pay the whole income (after paying certain expenses) to his six children, who were named, during their respective lives, and after the death of any of them to pay the share of such deceased to his or her lawful issue, and upon the death of any of them leaving no lawful issue living, to pay the share of such deceased to the same person or persons and in the same proportions as the remainder of the income of the trust; and upon the death of all the above named children of the said John Ware to convey the above granted premises to their lawful issue in the same proportions in which they would have taken the income if the trust above declared and limited had continued; or, if they shall have no such issue living at the death of the last survivor, to the heirs at law of the said John Ware; and notwithstanding anything hereinbefore contained to dispose of the granted premises in such manner, or hold the same upon such trusts, as the said

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John Ware shall by his deed or by his last will and testament duly executed appoint.

In February 1862 John Ware married Mary G. Chandler, who survived him; in April 1863 one of his sons died unmarried and without issue; and on the 29th of April 1864 John Ware died, seised of a large estate, real and personal, and leaving a will and codicil.

The will was dated December 1st 1853, and by it the testator gave certain real estate to his wife Helen, who died before him, and devised all the remainder of his estates, both real and personal, in trust for his wife and children, the latter sharing equally therein. The codicil was dated April 28th 1864, and the following is the material portion thereof:

"I, John Ware, of the city of Boston, physician, make this codicil to my last will. I give, bequeath and devise unto my wife Mary G. Ware, in fee simple, one sixth part of the whole estate and property, real, personal or mixed, whereof I die possessed. It being my intention to give to her what would be her legal share if she were one of my children. She, my said wife, to accept and receive the same in stead and in satisfaction of her rights and claims to dower.

"And I hereby ratify and confirm my last will above mentioned, in all respects wherein it is not inconsistent with or affected or qualified by this codicil; the said last will bearing date the first day of December in the year eighteen hundred and fifty three."

The case was reserved by the chief justice for the determination of the whole court.

*J Lathrop*, for Mary G. Ware. There are two questions in this case: 1st, whether Mrs. Ware takes one sixth of the undivided quarter part of the estate covered by the deed of trust and 2dly, whether she takes her one sixth of whatever she may be determined to be entitled to in fee, or subject to the trusts imposed on the other five sixths.

That the codicil operates as an appointment in favor of Mrs Ware is established by *Amory* v. *Meredith*, 7 Allen, 397. And this was the intent of the testator. *Maddison* v. *Andrew*, 1

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Ves. Sen. 61. Sugden on Powers, (8th ed.) 337. It is also plainly declared to be his intent that she should take an estate in fee. See *Brown* v. *Wood*, 17 Mass. 68; *Godfrey* v. *Humphrey*, 18 Pick. 537.

*W. G. Russell*, for certain of the children of John Ware, but in support of the same view. The general residuary clause in the will is an execution of the power of appointment reserved in the deed of trust, notwithstanding the power was created after the date of the will. *Winchester* v. *Forster*, 3 Cush. 366, and cases cited. Gen. Sts. *c.* 92, § 4. *St.* 1 Vict. *c.* 26, § 24. *Stillman* v. *Weedon*, 16 Sim. 26. *Cofield* v. *Pollard*, 3 Jur. (N. S.) 1203. *Thomas* v. *Jones*, 2 Johns. & Hemming, 475. Sugden on Powers, (8th ed.) 306, 309. But if the will does not have this effect, the codicil certainly has. *Brownell* v. *DeWolf*, 3 Mason, 494. *Goodtitle* v. *Meredith*, 2 M. & S. 5. *Winter* v. *Winter*, 5 Hare, 306. *Washburn* v. *Sewall*, 4 Met. 63. *Doe* v. *Walker*, 12 M. & W. 591. *Coppin* v. *Fernyhough*, 2 Bro. C. C. 291. *Barnes* v. *Crow*, 4 Bro. C. C. 2. 1 Jarman on Wills, (4th Amer. ed.) 178. The language of the codicil shows that the testator intended to die testate as to the whole of his estate, including that covered by the deed of trust. The express reference to the subject matter of the power, and the actual disposal of a part of the estate under it, are sufficient evidence of an intent to execute the power over the remainder of the estate. Sugden on Powers, (8th ed.) 338, 342. *Standen* v. *Standen*, 2 Ves. Jr. 589. *Walker* v. *Mackie*, 4 Russ. R. 76. *Elliott* v. *Elliott*, 15 Sim. 321. *Reid* v. *Reid*, 25 Beav. 469. *Bush* v. *Cowan*, 32 Beav. 228.

*G. Putnam, Jr.*, for the guardian *ad litem* of the grandchildren of John Ware. The case of *Amory* v. *Meredith* stands perfectly well on the presumable intent of the testator. The true rule seems to be that if, upon a fair consideration of the testator's circumstances and the language of his will, he seems to have intended to exercise the power, he will be deemed to have done so, although the will may not in terms refer to it or to its subject. The present case is different from *Amory* v. *Meredith* in these particulars: 1. The property over which the testator had a power was not in his possession or enjoyment. 2. In

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*Amory* v. *Meredith*, there was no disposition of the property in the trust deed in failure of appointment. In the present case, as careful provision was made for the case of a default of appointment, it may well be inferred that the testator meant that the property should remain as it was settled until he should modify the uses of the deed by some distinct and unequivocal act. See Sugden on Powers, (8th ed.) 305, 306. The clause in the codicil in favor of Mrs. Ware is modified and explained by the next clause, which declares it to be the testator's intention that she should have what would have been her legal share if she had been one of his children. This means, if he had died intestate. *Daggett* v. *Slack*, 8 Met. 450. *Tillinghast* v. *Cook*, 9 Met. 143.

This will should not operate as an appointment, by reason of the doctrine that a will is deemed to speak from the death of the testator, because that doctrine is a rule of intention, and is not permitted to operate against the intention of the testator. *Langdon* v. *Astor*, 16 N. Y. 9, 38. As, for example, it will not revive an adeemed legacy; *Cowper* v. *Mantell*, 22 Beav. 223; *Paine* v. *Parsons*, 14 Pick. 318; Redfield on Wills, 368 *n*; or exercise a power created since the date of the will; *Holmes* v. *Coghill*, 7 Ves. 499; *Jewett* v. *Board*, 16 Sim. 352. The present case is within both of these exceptions. In seeking for the intent of a testator, that meaning should be given to his language which the law gave to it at the time he used it.

Hoar, J. This cause has been delayed for some time under advisement, and has been repeatedly considered by the court. It presents a question of very great difficulty, and one which not only permits something of much force to be said on each side, but of which a decision either way is not likely to be wholly satisfactory. Still it is our duty to decide it, and to give the best interpretation in our power of the very doubtful language used by the testator whose will and codicil we are required to construe.

In *Amory* v. *Meredith*, 7 Allen, 397, it was held that the rule adopted by the English courts of equity, in determining whether a general power of disposing of property was executed by a

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general devise or bequest of the property of a testator, was not a sound rule of construction; that it had been found in a large majority of cases to defeat instead of furthering the intent of the testator, to ascertain and make effectual which is the chief duty of courts in interpreting the language of wills; and that a different rule must be applied. We therefore determined that where there was a general power of disposal, a general bequest or devise would be presumed to include an exercise of the power, if there were nothing to show a contrary intent; and that this presumption should certainly be decisive in a case where the general power of disposal was accompanied by the beneficial use of the property which was the subject of the power, and where the power was created by the testator.

The case at bar differs from that in the important particular, that here the beneficial use under the deed of trust which created the power was not reserved to the testator, unless perhaps by implication upon the remote contingency of all his children dying without issue before him. The power was also created after the execution of the will.

But in looking at the language of the codicil, considered in relation to all the circumstances of the case, we have come to the conclusion that the will is an execution of the power reserved by the trust deed, and that neither of the considerations adverted to is decisive against it.

The will, made in the year 1853, provided for the testator's wife, then living, in a manner which became inoperative and unimportant upon her death; and gave the whole residue of his property in trust for his children and their issue. In 1860, his wife having died, and his children being arrived at adult age, and some of them married, by a deed of trust he conveyed one undivided fourth of a valuable parcel of real estate which constituted the bulk of his property, to three trustees, two of whom were also trustees under his will, in trust for his six children, by name, and their issue; and in case of their death without issue, in trust for his own heirs. He reserved to himself the most complete and absolute power, by deed or will, to alter the uses or the trusts. In 1862 he married again. In 1863, he lost one of

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his sons by death, who was a trustee under the will and deed of trust. In 1864, he made the brief codicil which is before us for construction; and died the day after it was made. The codicil contains three clauses of importance. It first gives to his wife "in fee simple, one sixth part of the whole estate and property, real, personal or mixed, whereof I die possessed." The explanatory statement follows, "it being my intention to give to her what would be her legal share if she were one of my children." And then it ratifies and confirms his last will in all respects in which it is not inconsistent with or affected or qualified by the codicil.

It is to be observed that in the will, and in the deed of trust, the testator had preserved the most careful equality among his children in the amount of property appropriated to their use. One of his children had died; and he wishes to give his wife one sixth of his whole estate and property of which he should die possessed. This proportion is chosen for the reason that it will put her on an equality with his children. Such we think is the fair interpretation of his language. If then we find that under the rule in *Amory* v. *Meredith* "the property of which he should die possessed" would be presumed to include, in his own understanding of the phrase, property which had been his own and of which he retained the absolute and unlimited power of disposal, the devise to her would include the estate held under the deed of trust. It would give his wife the exact position of the child he had lost. The phrase "legal share," it is argued, indicates that he meant the share which would have gone to a child if he had died intestate. But we think this was not the sense in which the testator used the word. He would hardly have thought that he was giving a new child his full legal share of his estate, if there were a considerable proportion of his property, entirely subject to his disposal by will, appropriated exclusively to his other children, and in which that child was not allowed to participate.

We are not unmindful of the force of the suggestion made by Lord St. Leonards, in commenting on the case of *Moss* v *Harter*, that "when the property is settled by the testator himself

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upon others, in default of any appointment by him under his power, it would seem to require some indication of an intention by him to defeat his settlement, in order to hold a general gift in his will, which can be satisfied by other property, to be an execution of his power." Sugden on Powers, (8th ed.) 305. But we think the indication of such an intention sufficient in the present case.

The view which we have taken is strengthened, in our judgment, by the express ratification and republication of the will which the codicil contains. This makes the will speak as from the date of the codicil; and the disposition being construed to refer to all the property of which the testator had then the absolute power of disposal, these two considerations will bring the case substantially within the principle of the decision of *Stillman* v. *Weedon*, 16 Sim. 26, upon the effect of the 24th and 27th sections of the English Statute of Wills of 1 Vict. *c.* 26. The cases in which the republication of a will has not been held to give it the effect of executing a power created after the original date of the will seem all to stand upon peculiar phraseology indicative of the intent of the testator.

As we hold that the power is executed by the codicil upon the one sixth part given to Mrs. Ware in fee, it follows that the testator, by dealing with the property subject to the power, gives a sufficient indication of an intention to execute it wholly; and that the residue of the estate conveyed by the deed of trust is appointed to be held upon the trusts set forth, and by the trustees named, in the will. *Standen* v. *Standen*, 2 Ves. Jr. 589. And it is a highly reasonable presumption that the testator would not have desired that undivided interests in the same piece of property should be held after his decease by separate trustees, when the whole was intended for the benefit of the same persons. The construction which we give to the codicil seems most likely to effect his intention; and we think it can be reasonably deduced, though not with absolute clearness and certainty, from the language in which his purposes were expressed.

A decree will be entered that the codicil operates as an execution of the power of disposal of all the property conveyed by

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the deed of trust; that Mary G. Ware is entitled to one sixth part of the whole residue of the estate of the testator remaining for distribution after the settlement of the estate, including the property described in the deed of trust, in fee simple; that the remainder is to be held by the surviving trustees under the will, upon the trusts set forth in the will; and that the costs of all the parties be allowed and paid out of the entire estate in the hands of the administrator.

HENRY F. DUMAIN & wife *vs.* ANNE L. GWYNNE.

If a married woman who has been compelled to live separate from her husband by reason of his intemperance and crime is unable to provide for her children, and thereupon voluntarily gives them up to a charitable institution established for the purpose of furnishing homes to destitute children, under a written contract by which the children are to be placed out or adopted in a good family, and she is not to seek to discover them or deprive such family of them, the contract is valid; but this court, on a *habeas corpus* afterwards brought by the parents to recover their children, will inquire whether the welfare of the children is properly attended to, and in so doing will not be restricted to the ordinary modes of trial, nor require the children to be brought into open court, or their residence disclosed to their parents.

HABEAS CORPUS issued in behalf of Henry Dumain and Helen M. Dumain, his wife, to recover possession of their two children, Henry F. Dumain, aged nine years, and Eva M. Dumain, aged six years. The case was reserved by *Chapman*, J., for the determination of the whole court, on facts which are fully stated in the opinion.

*J. Rutter*, for the petitioners, cited Gen. Sts. *c.* 110, § 3; *Commonwealth* v. *Addicks*, 5 Binn. 520; *In the matter of Waldron*, 13 Johns. 419.

*R. H. Dana, Jr. & S. Snow*, for the respondent, cited *Curtis* v *Curtis*, 5 Gray, 535; *Day* v. *Everett*, 7 Mass. 145; *Pool* v. *Gott* 14 Law Reporter 267; *Commonwealth* v. *Maxwell*, 6 Law Reporter, 214; *State* v. *Smith*, 6 Greenl. 462; *People* v. *Kearney* 31 Barb. 430; *People* v. *Olmstead*, 27 Barb. 9; *Colston* v. *Morris* 1 Jacob, 257, *note* a; *Blake* v. *Leigh*, Ambl. 306; *Rex* v. *Delavau*

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3 Burr. 1436; Forsyth on Custody of Inf. §§ 36–38, 63; Gen. Sts. *c.* 110, §§ 2, 3; *c.* 111, § 2.

CHAPMAN, J. The common law regards the father as the natural guardian of his children, and recognizes his right to their custody. Formerly his right was held to be so much superior to that of the mother that when she had separated herself from him on the alleged ground of ill treatment, and taken with her their infant child, then at the breast, it was brought into court on *habeas corpus* and delivered to the father, though he was an alien, or was living in illicit intercourse with another woman, unless she could make it appear that he intended to abuse his right. *The King* v. *De Manneville*, 5 East, 221. *The King* v. *Greenhill*, 4 Ad. & El. 624. By *St.* 2 & 3 Vict. *c.* 54, the rights of the mother are now better provided for. But before that statute the courts of chancery in England were accustomed to disregard the strict legal rights of the father to the custody of the children, whenever the welfare or interests of the children required it. In some instances they have taken his children from him and placed them in the custody of strangers. They have regarded the welfare of the child as paramount to the rights of the father or mother. In this country our courts of law, while adopting the legal principle that the father is usually entitled to the custody of his children, have been inclined to modify it by adopting the equitable principle that this right must yield to considerations affecting the welfare of the children, and by regarding more highly the rights of the mother. *Commonwealth* v. *Briggs*, 16 Pick. 203. *Pool* v. *Gott*, 14 Law Reporter, 269. *State* v. *Smith*, 6 Greenl. 462. *Mercein* v. *The People*, 25 Wend. 102.

In some of the states the common law has been modified by legislation. In this commonwealth, if parents allow their children to become truants or to grow up in ignorance, the children may be taken by the municipal authorities and placed in houses of reformation or institutions of instruction. When the parents live separate, or when proceedings for divorce have been instituted, this court has authority to make decrees upon the petition of either parent concerning the care, custody, education and

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maintenance of the minor children; and as between father and mother it is provided that the rights of the parents, in the absence of misconduct, shall be held to be equal, and the happiness and welfare of the children shall determine the custody or possession. Gen. Sts. *c.* 107, §§ 36, 37. To what extent these rights impose obligations on the mother in respect to the maintenance of the children has never been determined. Provision is also made for the adoption of children, by which all the legal rights of both parents may be transferred to a stranger, by a decree of the probate court, and the child may become the legal heir of its adopted parent. If a parent does not consent to such adoption of his child, or if he is not found in the state, the probate court may, after the publication of certain specified notices, decree without his consent that the child shall, to all legal intents and purposes, be the child of the person petitioning for the decree. Gen. Sts. *c.* 110. This statute regards the happiness and welfare of the children as being much more important than the legal rights of either parent. Independently of the statute, it is held by this court that a father may transfer to his child his right to the services and earnings of the child, and is bound by his contract or gift on this subject, and that he may by his misconduct forfeit his right to the custody and services of his child either temporarily or permanently. *Abbott* v. *Converse*, 4 Allen, 530, and authorities there cited.

Cases like the present should be decided with a due regard to the rights and also to the affections of the parents, but with a paramount regard for the welfare of the children. It should be kept in mind that one of the important objects of the law is to encourage and promote as far as possible the exercise of mutual affection between parents and children, and that one of the purposes of education is to train children to the cultivation of filial affection. But unfortunately there are cases where the policy of the law is best promoted by the separation of children from one or both of their parents.

In this case the father had disqualified himself from taking proper care of his children in their early infancy by his intemperate habits. In addition to this, he committed the crime o'

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burglary, for which offence he was sentenced to the state prison for the term of three years. His right to the custody of his children was then forfeited; but it is not necessary to decide whether such a forfeiture would under all circumstances be permanent. His wife, being compelled to live separate from him, was under our statutes entitled to the custody of the children as against him; and if she had found persons ready to adopt them, a decree for their adoption might have been obtained, and by virtue of such a decree all the rights of both parents to the custody and control of the children would have ceased. If she chose to make provision for them without procuring such a decree, it would be unreasonable to hold that such an arrangement would be binding only so long as the father remained in prison. The present policy of our law requires us to regard any reasonable arrangement made by her as valid against herself and her husband, though it should extend through the whole term of the children's minority, subject of course to statute regulations respecting apprenticeship, and any other positive provisions of law.

Not long after her husband's confinement in prison, she went to the Temporary Home for Destitute Children. It was incorporated by this name "for the purpose of affording shelter and support to children and other persons destitute of a home, until more permanent provision can be made for them." She there found the respondent, Miss Gwynne, who was and still is the matron of the institution, and the agent of the board of managers, and represented to her that she could not take care of the children, and should never live with her husband again, and she freely signed the following contract:

"Boston, March 3, 1860. For and in consideration of expenses already incurred by the Managers of the Temporary Home for the Destitute, in the case of my child Eva Manetta, two years of age, and in consideration of a suitable place being found for her in a good family into which she may be adopted and suitably provided for and educated, I hereby engage, of my own free will, to give her up to the managers of the institution, to be placed out as they may judge best, or for adoption into a good



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family; and in case of the latter, I now engage that I will not seek to discover, to molest, or to deprive them of the child, but that I will rely upon the matron and managers to dispose of her as they may judge best for the good of the child; and I now agree to give her up to them fully and unreservedly. Helen M. Dumain." A similar agreement was also made in respect to her son. Under these agreements the children were received by the respondent. We think the contracts had as much validity as if they had been signed by the husband.

He was discharged from imprisonment four months before his time expired, for his good behavior. He and his wife have since lived together; he has industriously pursued his trade as a blacksmith; his character and conduct have been good; he has lived comfortably and laid up some property. He and his wife are now able to support their children comfortably, and are desirous to do so, and the object of this process is to obtain the custody and control of them.

The respondent declines to produce them or to state where they are, and alleges that she has given them to a family where they are well treated and educated; that they have become much attached to the family and the family to them; that it would be injurious to the children to have communication with the parents, and that the rules and practice of the institution forbid her to produce them or to disclose where they are. She also says that neither of the petitioners has any legal right to them, but that Dumain has forfeited his right; that the contract of the wife is legal and binding, and that the persons who have the children have incurred considerable expense in their maintenance and education. To show the importance of the questions involved, she states that the managers of the institution have disposed of many other children in a similar manner.

Without holding that the rights of either parent in respect to the children are absolutely lost, we must nevertheless hold that they are subject to the rights of the other party to the contract above mentioned, it having been freely and fairly made, and being a suitable contract for the wife to make. But the rights of the corporation under it depend upon its fulfilment in good

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faith on their part, and on the part of the persons to whom they have transferred the custody of the children.

The court has power upon this process to inquire fully into the matter; and as the liberty and welfare of the children are involved, the judge who hears the case ought to satisfy himself whether the children are improperly restrained, and whether their comfort and education are properly attended to. He is not restricted to the ordinary modes of trial, but may direct that the children be brought before him, and may examine them privately, and may also avail himself of affidavits or other reasonable and proper sources of evidence. *Pool* v. *Gott*, *ubi supra*. Hurd on Habeas Corpus, 303.

If the children were of suitable age, he might to some extent be influenced by their opinions and preferences. But the petitioners have not, in the absence of all reason to believe the contract is disregarded, a right to require the production of the children in court, or to be informed where they are. In some of our public institutions it has been deemed expedient to keep parents in ignorance of the place where homes have been found for their children, on account of the disposition often manifested to visit them and excite uneasiness and discontent in their minds. Such influences may be feared in this case, and there may be just ground for the suggestion made by the respondent's counsel, that if the former character of the father were made known among the present schoolmates and associates of the children, it might cause annoyance and injury to them at their present tender age. The children ought not to be thus exposed, unless the judge who hears the cause shall have some ground to believe that their welfare requires it.

The case is to be further heard, upon an amended answer and such further evidence as the judge who hears it shall deem proper upon the principles here stated.

After the foregoing decision a hearing was had before *Chapman*, J., who was satisfied upon the evidence that the children were disposed of in the manner stated by Miss Gwynne, that they were members of a good family in this commonwealth, and

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subjected to no undue restraint, and treated kindly and affectionately, and that it is the intention of those who have taken them to give them an education much better than their parents could give them. All further proceedings in the case were thereupon stayed.

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## Frances E. Cochrane, petitioner.

**A woman from whom a divorce has been granted on the ground of adultery may in the discretion of this court, under *St.* 1864, *c.* 216, have leave to marry again, simply upon proof that since the divorce she has maintained a good character and is a fit person to marry**

Petition for leave to marry again, under *St.* 1864, *c.* 216. The petitioner alleged that at October term of this court in 1860, her husband, William A. Cochrane, obtained a divorce from her for the cause of adultery; that the same was obtained without collusion; that she has never been convicted of adultery, and that more than three years have elapsed since the date of said decree. On this petition, notice was ordered and given to the husband, and the same was published in a public newspaper; but no person appeared to oppose it.

At the hearing in this court, before *Chapman*, J., the petitioner proved that since the granting of the divorce she had lived with her father; and that she had maintained a good character during said period of upwards of three years; and that she was of a suitable age, and, in the opinion of the witness, a fit person to marry. But the judge decided that, admitting this evidence to be true, it did not establish a case to which the provisions of the statute ought to be applied, but that still further facts should be proved to entitle the petitioner to the decree prayed for; that, as a general rule, a party who has violated the obligation of the marriage covenant by committing the crime of adultery is not entitled to the confidence of the court, nor to a decree that certifies such confidence, and may enable the party to practise deceit on another party; that there are a great many exceptional cases

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to which the statute may be usefully applied; for example, a party who has been absent from the state for a few months may, on his return, find a decree of divorce against him, upon notice published in a newspaper which never reached him, and upon *ex parte* evidence, which might have been refuted if he had been present; or perhaps he may prove extenuating circumstances and repentance, and a thorough change of principles and character. But if the statute were to be construed as the petitioner contends it should be, it would operate as a temptation to any party desiring to get rid of a husband or wife to commit adultery in some place beyond the jurisdiction of our criminal courts, as a convenient method of accomplishing the object by the instrumentality of this court; and the discretion of the court ought to be exercised with the greater caution, because hearings on such petitions are *ex parte*, there being no person interested to oppose them, or inform the court of the whole truth of the case. The judge, therefore, ordered the petition to be dismissed, and decided that the petitioner had no right of exception.

The petitioner alleged exceptions.

*W. Brigham*, for the petitioner.

Dewey, J. No exception lies to the ruling of a judge upon a matter simply discretionary. Had the ruling in this case been of this character, it would not be open to review upon this bill of exceptions. But the court in the present instance have ruled as a matter of law, that, upon the facts offered in evidence, and conceding them to be true, they did not establish a case to which the provisions of *St.* 1864, *c.* 216, ought to be applied. This abstract proposition, we think, was not correct. Such evidence certainly was not conclusive, and a broad field for discretion is open to the presiding judge upon all the surrounding circumstances and facts bearing upon the particular case. But in the absence of any such other facts unfavorable to the petitioner, we think the evidence offered in the present case might be deemed sufficient to authorize the granting of the petition, and it would be competent for the court to grant it.

*Exceptions sustained.*

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EDMUND TARBELL *vs.* ELIZA A. TARBELL.

An ante-nuptial contract by which a woman agrees to relinquish her distributive share of her intended husband's estate will be enforced in equity, if entered into understandingly for an adequate consideration, and without fraud or misrepresentation on his part.

BILL IN EQUITY brought by the executor of the will of Abel Tarbell, late of Groton, deceased, to restrain his widow from making any claim for dower or her distributive share of his estate, upon the ground that they, on the 28th of August 1858, being in contemplation of marriage, made an agreement, reciting the contemplated marriage, and that said Abel, in consideration thereof, and in order to preclude her from "claiming any allowance or interest as his wife in his personal estate after his decease," had made over to her certain shares in a corporation, of the value of one thousand dollars, to have and to hold as her separate property forever, which she had accepted in full satisfaction of any claim to dower and to an allowance or interest in his personal estate after his decease; and providing that all her property should be her sole and separate property during such marriage; that she should have full right to convey the same during her life or dispose thereof by will without his assent in writing, that he would treat her as a faithful and affectionate husband; that she would well and faithfully live with him during his life, and would within a reasonable time after his death surrender up and deliver to his executors, administrators, heirs, legatees and devisees all his real and personal estate of every name and description, and not claim dower in any of his real estate or any allowance from his personal estate, in any manner or form whatever.

The bill alleged that the agreement was duly executed; that the recitals therein were true; that the parties were shortly after married to each other; that said Abel faithfully performed his part of the agreement; that the agreement was in all respects fair; that said Abel was eighty-four years old; that she was of middle age; that he died on the 19th of October 1860; that she

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has applied to have her dower set off to her, and also to have an allowance made to her for her distributive share of his estate and the prayer was that she might be restrained from prosecuting her said petitions.

The answer, which was under oath, set forth that said Abel, several days before the marriage, delivered to her the shares referred to as a present, without in any way intimating that any conditions were annexed to her acceptance of them; that on the day of the marriage, and just before the solemnization thereof, he presented to her a paper for her signature, saying that as he had given to her the shares it was well to have some writing to show for it; that she did not read the paper, nor was it read to her; that she did not suppose that it had any other effect than to acknowledge the receipt of the shares as a gift; that she was under great excitement of mind, and had no time for examination of the paper or consultation with her friends, and relied wholly upon the truth of his statement; that said paper has not the effect to deprive her of her claim to dower and a distributive share of his estate; that at the time of the marriage his collateral relatives took no care of him; that by her marriage to him she assumed to devote herself wholly to him, and to give her time and strength to a constant and faithful attendance upon him; to deprive herself of all personal pleasure and happiness, and to expose herself to odium and ridicule.

Evidence was taken as to the circumstances under which the contract was executed, and of other facts which it is not necessary to state here; and the case was reserved for the determination of the whole court.

*G. O. Shattuck & G. Putnam, Jr.*, for the plaintiff, cited *Sullings* v. *Richmond*, 5 Allen, 187, and cases cited; 2 Story on Eq. §§ 1370, 1371, and cases cited; *Drury* v. *Drury*, 2 Eden R. 60; *Dyke* v. *Rendall*, 2 De G., Macn. & Gord. 209; *Druce* v. *Denison*, 6 Ves. 385; *Gurly* v. *Gurly*, 8 Clark & Fin. 743; *M'Cartee* v. *Teller*, 2 Paige, 511.

*J. G. Abbott*, for the defendant, contended that the evidence was insufficient to prove that she had understandingly signed the contract, and that under the statutes of Massachusetts a

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woman cannot bar herself by an ante-nuptial contract of her distributive share in her husband's estate. Gen. Sts. *c.* 108, § 3. The policy of the law is against enforcing such a contract Neither party can have any data upon which to act understandingly. It cannot be known how large an amount the woman is to bar herself of; how much she will contribute to the fund how long she may be compelled to devote herself to his comfort; or which will die first. Besides; a wife should not be allowed to enter into a contract by which she may be thrown upon the world, perhaps as a pauper, if her husband leaves property. This contract was an extraordinary one; it was not only for the purchase of a wife, but a purchase with covenants of warranty. She had to agree that she would behave herself well.

Hoar, J. The principles upon which a court of equity proceeds in enforcing the specific peformance of an ante-nuptial contract, by which a married woman agrees to relinquish any distributive share of her husband's estate, were stated by this court in *Sullings* v. *Richmond*, 5 Allen, 187. The validity of such a contract was fully recognized; but it was held that the remedy upon it was not in the court of probate.

The defendant now insists that she never gave an intelligent assent to the contract which the plaintiff seeks to enforce; but we think the evidence to the contrary plenary and conclusive. We find no reason to doubt that she entered into the agreement with a full understanding of its force and effect; that it was made without fraud or misrepresentation on the part of her husband; was a reasonable one under all the circumstances, supported by an adequate consideration, and that it has been fully performed on his side. There is nothing in the case to show that the original equities in favor of the legatees under the husband's will have changed. The authorities cited for the plaintiff are abundant to show that in such a case it is the rule and the duty of a court of equity to enforce the performance of the contract. *Decree for the plaintiff with costs.*

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## Harvey Graves *vs.* Hampden Fire Insurance Company.

If the owner of the equity of redemption of land, in pursuance of a provision in the mortgage, procures a policy of insurance upon the buildings standing thereon, at his own expense, payable to the mortgagee in case of loss, and the policy contains a written provision that no sale of the property shall affect the right of the mortgagee to recover in case of loss under the policy, and the equity of redemption is afterwards sold, and a loss occurs, and the insurance company upon paying the amount thereof to the mortgagee take from him an assignment of the mortgage and policy, the purchaser of the equity of redemption is entitled to the benefit of the money so paid by the insurance company, and may redeem the land upon paying to the insurance company the balance due upon the mortgage debt after deducting that amount.

Bill in equity to redeem land from a mortgage. The following case was presented upon the bill, demurrer, and facts agreed:

On the 3d of June 1863 Caleb E. Foster was seised of a certain piece of land in Brighton with buildings thereon, subject to a mortgage to Samuel Bigelow which provided that the mortgagor should keep the buildings insured in a sum not less than twenty-five hundred dollars, for the benefit of the mortgagee. On that day Foster conveyed the premises to David H. Plumb, who immediately procured of the defendants a policy of insurance, at his own expense, upon the buildings, for three years, payable to Bigelow in case of loss. In September following, Plumb sold the premises to William H. Chaffee, and as his deed from Foster had never been recorded it was surrendered to Foster, who thereupon executed a new deed directly to Chaffee. In October following the buildings were destroyed by fire. The policy contained a written provision that "no sale of the property shall affect the right of the mortgagee to recover in case of loss under the policy;" and a printed provision that "if the title to said property shall be in any way changed, the risk thereupon shall cease and determine." On the 12th of November 1863 the defendants paid to Bigelow $2542.96, and took from him an assignment of the mortgage and policy. The premises were subsequently conveyed to the plaintiff, subject to any legal incumbrances thereon; and he offered to pay to the defendants the balance due upon the mortgage debt, after deducting the

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amount due upon the policy and certain other legal charges. The defendants however declined to take the same, and claimed the whole amount of the mortgage debt. The buildings without the land, and the land without the buildings, were each worth more than the amount of the mortgage debt.

The case was reserved by *Gray*, J., for the determination of the whole court.

*T. S. Dame*, for the plaintiff. The written clause in the policy controls the printed one. 2 Phil. Ins. § 1943. The policy was procured by Plumb on his own interest in the property, and he and his assigns are entitled to the benefit of it. *King* v. *State Ins. Co.* 7 Cush. 1. *Providence County Bank* v. *Benson*, 24 Pick. 204.

*J. Wells*, for the defendants. The policy was a personal contract with Plumb, founded on his own interest merely. Even if the plaintiff acquired Plumb's interest, it would give him no interest in the policy. *Felton* v. *Brooks*, 4 Cush. 203. *Wilson* v. *Hill*, 3 Met. 66. The stipulation in favor of the mortgagee is personal to him, and confers no right on the purchaser of the equity, but by implication excludes him. *Macomber* v. *Cambridge Ins. Co.* 8 Cush. 133. The mere fact that the mortgagee holds indemnity collateral to his mortgage does not give the holder of the equity such right. *White* v. *Brown*, 2 Cush. 412. *King* v. *State Ins. Co.* 7 Cush. 1. *Ætna Ins. Co.* v. *Tyler*, 16 Wend. 385. *Concord Ins. Co.* v. *Woodbury*, 45 Maine, 447. The present suit is in effect to compel the payment of the policy, that the amount may be applied upon the mortgage debt for the benefit of the purchaser of the equity. But he has no such interest in the policy as to entitle him to do this. *Smith* v. *Packard*, 19 N. H. 575. *Kip* v. *Mut. Ins. Co.* 4 Edw. (N. Y.) 86.

Dewey, J. Had there been no change in the relation of the original parties to this contract of insurance from that which existed when the policy was effected by David H. Plumb, it would have presented the ordinary case of a policy where the mortgagor causes insurance to be made on the mortgaged premises payable to the mortgagee in case of loss. In such case the

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insurer would be bound to pay the whole loss, and the mortgagee would receive it and be holden to apply it so far as was necessary to discharge the mortgage, and, in case the mortgage debt had been previously paid, the mortgagee would receive the sum paid for the loss for the use of the mortgagor. *King* v. *State Ins. Co.* 7 Cush. 1.

It is equally clear that, in the case stated, the continued existence of the mortgage debt or right in the mortgagee to take to his own use the money paid for the loss is not essential to a recovery for such loss, the mortgagor continuing to hold his interest in the property. The reason is obvious. The policy was the policy of the mortgagor, and was obtained upon his interest, and his interest is in no way diminished by the discharge of the mortgage. But on the other hand if a mortgagee obtains a policy on his interest, the validity of the policy does wholly depend upon such interest not being extinguished by payment of the debt, and in case of such payment the policy expires. In such case the mortgagee is not bound to account to the mortgagor for any part of the money received by him from the insurance company as a payment on the mortgage debt.

The present case is to be treated as a policy on the interest of the mortgagor, but payable in case of loss to the mortgagee, qualified by a provision that no sale of the property shall affect the right of the mortgagee to recover in case of a loss. We are then to assume that this policy was procured by the mortgagor and at his cost, and was one which he might cause to be enforced for his benefit, and the avails to be applied, first, to discharge the mortgage debt, and the surplus to his own benefit unless that right has been lost by alienation of his interest. It is conceded that such alienation has been made. In September 1863, Plumb who obtained this policy parted with all his interest in the property insured, and the same was transferred to Chaffee, Plumb surrendering to his own grantor the unrecorded deed to him by Foster, and Foster thereupon conveying the equity to Chaffee. After the loss, the right in equity was conveyed to Graves the plaintiff. Thus Plumb ceased to have any interest

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in the property insured. The sale to Chaffee of the equity would not pass this policy to Chaffee. It was a mere personal contract of indemnity made with Plumb for the benefit of himself and the mortgagee Bigelow. *Wilson* v. *Hill*, 3 Met. 66.

The further inquiry is as to the effect of the clause in the policy, "No sale of the property shall affect the right of the mortgagee to recover in case of loss under this policy." In terms the provision is wholly confined to the mortgagee. Such alienation shall not affect his right to recover. He might undoubtedly have enforced this indemnity against loss to the extent of his mortgage, but the question is, can he be compelled to do it by the plaintiff? Does the fact that he might recover for this loss to the amount of his mortgage debt operate to require him to do so, and to cancel his mortgage debt to the amount he is thus entitled to receive? It is not the question whether Plumb could have required this, had he not parted with all his interest in the property before the loss. The question is, whether a mere holder of the equity by purchase can require the mortgagee to avail himself of his right thus to recover as mortgagee, and apply the proceeds in discharge of the mortgage debt. Has the plaintiff any such interest in the policy that he can require this?

It appears that, by virtue of an original stipulation in the mortgage deed to Bigelow, the mortgagor had agreed to keep the buildings on the mortgaged premises insured against fire in a sum not less than $2500 for the benefit of the mortgagee, and under this agreement the original mortgagor and those succeeding to his right in equity to redeem had caused such a policy to be made, and continued to the time of the loss. This policy thus made legally secured to the mortgagee the payment of the sum of $2500 by the Hampden Fire Insurance Company as a vested right. There was upon the happening of this loss a change in the relation which the mortgagee sustained to the policy. What was before contingent became an absolute right to receive $2500 from a source which the mortgagor and the owner of the equity had provided as a means, in a certain event,

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of paying that amount upon the mortgage. Having this available fund thus provided by the mortgagor and those succeeding to his rights, and the contingency having happened upon which he was to receive it, we think it must be held to be his duty to receive it and apply it to the payment of the debts secured by the mortgage. As to the Hampden Fire Insurance Company, they certainly can stand in no better situation than Bigelow, having received the transfer of the mortgage with full knowledge of the existence of the policy, and that a loss had accrued thereon by reason of which he was entitled to receive from them the sum of $2500 as mortgagee. The Hampden Fire Insurance Company now holding the relation of assignees of the mortgage by assignment from Bigelow, and also that of debtors under the policy for $2500 to be paid to Bigelow in discharge of the mortgage debt, the law will treat it as paid, the same hand being entitled to receive which was bound to pay.

In the opinion of the court, the money which the mortgagee was thus entitled to receive from the insurance company and as to payment of which no objection intervened, the same having accrued under the circumstances we have stated, should be applied in part payment of the mortgage debt.

A bill in equity may properly be maintained in behalf of the plaintiff, and a decree must be entered to the effect that the defendants be required to receive the amount due upon the mortgage over and above the amount due and payable upon the policy of insurance; and thereupon to cancel and discharge the mortgage and execute proper releases thereof.

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## Joseph C. Bailey *vs.* Ætna Insurance Company.

A mortgagee of land, upon making a sale thereof under a power of sale, in the ordinary form, contained in the mortgage, may give credit for the purchase money, though in case the sum for which the land is sold is more than the sum secured by the mortgage he is liable to pay the surplus to the owner of the equity of redemption in money.

If the purchaser at such sale executes to the mortgagee a note and a new mortgage of the land in part payment of the purchase money, and the person who formerly owned the right to redeem the first mortgage becomes the owner of the right to redeem the second mortgage, and thereafter takes out a policy of insurance payable to the mortgagee in case of loss, without any words to indicate which mortgage title he thereby intended to recognize, the title of the mortgagee under the second mortgage will, in the absence of evidence to the contrary, be taken to be the one that is referred to.

Contract upon a policy of insurance for $2000, issued by the defendants on the 14th day of April 1860, upon the plaintiff's dwelling-house in Brighton, for one year, "payable in case of loss to J. F. Taylor, mortgagee."

It was agreed in the superior court that in January 1855 Thomas Hunt mortgaged the premises to Jacob F. Taylor, to secure the sum of $3000, payable in three years, by a mortgage which contained a power of sale authorizing the mortgagee to sell the premises for breach of condition, "and out of the money arising from such sale to retain all sums then secured by this deed, whether then or thereafter payable, together with interest and all cost and expenses; paying the surplus, if any, to the grantor or his assigns." Taylor held also, as collateral security for his debt, a note of one Harrington for eight hundred dollars, which was paid to him, leaving $2200 due upon the mortgage debt. The plaintiff purchased the equity of redemption on the 7th of June 1856. In January 1857, Taylor sold the premises, under the power of sale contained in his mortgage, to Leander A. Haynes for $3200; and Haynes gave to Taylor a note for $2200, payable in six months with interest, and secured by a new mortgage upon the premises, and did not pay the balance of $1000. Haynes afterwards conveyed his equity of redemption, and in July 1857 the owner thereof advertised the property for sale at public auction, but was restrained by an injunction

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from this court, issued upon a bill in equity by the present plaintiff. No further proceedings were had upon the bill in equity, nor was any further attempt made to sell the property, until that owner of the equity of redemption became insolvent, and his title was conveyed by the assignees of his estate by a deed of release to the plaintiff on the 26th of January 1860. The plaintiff then, on the 14th of April 1860, took out this policy, stating to the defendants' agent that there had been disputes and litigation as to the title to the premises, which were now settled. On the 9th of the following August, Taylor sold the premises, under the power of sale contained in his mortgage from Haynes, to Sedgwick L. Plummer, and on the same day executed a deed thereof to him, dated July 9th 1860, and the policy was also assigned to him on the 8th of August. Plummer thereupon, on the 9th of August 1860, went to the office of the defendants in Boston, and without the plaintiff's consent or knowledge, cancelled the policy, and received back a portion of the premium money, and took out a new policy in his own name. On the day following, the premises were destroyed by fire.

The present action was brought with the consent of Taylor, who makes no claim under the policy.

On these facts, judgment was rendered for the defendants, and the plaintiff appealed to this court.

*H. C. Hutchins*, for the plaintiff. The sale by Taylor to Haynes under the first mortgage was void. Haynes bid $3200 for the property, and paid only $2200, and even this sum he did not pay in money, but by giving a note and mortgage. The power of sale only authorized a sale for cash. Of course the mortgagee must receive and account for the surplus, above his debt, in cash; and if the sale must to this extent be for cash, by what authority could he sell for a credit in any part? This sale was manifestly a mere sham. There was no pretence of paying any more than $2200 upon the purchase for $3200. And if this sale was void, no title passed, and of course the second sale was void also. If the second sale was void, the assignment of the policy was also void, because Taylor as mortgagee could only

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assign the policy with the debt and mortgage. *Young* v. *Eagle Ins. Co.* 14 Gray, 150, and cases cited. *Hale* v. *Mechanics' Ins. Co.* 6 Gray, 169. *Fogg* v. *Middlesex Ins. Co.* 10 Cush. 337. And under that state of things, of course Plummer had no right to cancel the plaintiff's policy.

*G. O. Shattuck*, for the defendants. The acts of the plaintiff, in taking a release of the right to redeem the second mortgage, and assuring the defendants' agent that the disputes and litigation as to the title were settled, gave validity to the sale, if any acts of his could have that effect. The accounting for the purchase money comes after the sale, and, if it is a condition, it may be waived. *Childs* v. *Dolan*, 5 Allen, 319. A sale under a power, with an agreement that a part of the purchase money may remain on mortgage, is valid. *Davey* v. *Durrant*, 1 De Gex & Jones, 535.

Dewey, J. The interest of the plaintiff in the property insured by this policy ceased to exist with the sale made by Taylor to Plummer on the 9th of August 1860, if that sale was a valid one. The validity of it depends upon the title of Haynes, the mortgagor. Haynes was himself a purchaser at a sale under a power of sale in a mortgage made by Hunt, the plaintiff at the time being the owner of the equity of redemption. The only objections to that sale are, that the amount bid for the premises was not duly paid in cash, and that a portion of it was not required by the mortgagee to be paid at all.

The sale was for a sum larger than the amount necessary to pay the sum due on the mortgage, and if the plaintiff was the owner of the equity of redemption, and there was in fact a surplus, we do not see any reason why he might not have treated it as a valid sale, and have demanded the surplus to be paid over to him. If the transaction was a *bona fide* one, and the purchaser an innocent party, the title passed to him, and he, by the terms of the power of sale, was not accountable to the owner of the equity for the proper application of the purchase money.

If the mortgagee elected to give a credit for payment, as between the purchaser and himself he might do so, and the

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mortgagor or his assignee entitled to the surplus would have the right to demand the cash for the same. If this whole proceeding of a sale to Haynes was, as is suggested upon the argument of the case, a fraud in which both parties concurred, this court would have forbidden the transfer of the property upon proper application. A proceeding of this character was at a former period instituted, and a proposed sale by an alleged owner of the equity of redemption of the mortgage given by Haynes was enjoined. But no further proceedings were had upon the bill, and subsequently Bailey, the plaintiff, became the owner of the equity of redemption of the Haynes mortgage thus given on the sale made on the 26th of January 1860. The effect of this was to place him very much in the position he originally occupied as owner of the equity under Hunt's mortgage. The Haynes mortgage was for an amount corresponding with the balance due on the mortgage of Hunt.

It was in this state of the title that the plaintiff procured his policy, and the inquiry is, whether it is not to be treated as a policy upon the interest of the plaintiff as owner of the equity of redemption of Haynes's mortgage to Taylor. It was by its terms made payable to Taylor as mortgagee, in case of loss. Taylor had ceased to be a mortgagee of Hunt. He had sold Hunt's title and made a conveyance to Haynes, under a power of sale contained in that mortgage. The existence of the mortgage by Haynes to Taylor was recognized by the plaintiff's purchasing the equity of redeeming it.

It is true that the plaintiff might have taken the release of the equity of redemption of the Haynes mortgage merely to be resorted to, in case his old title did not avail him, and therefore he is not to be estopped for that cause. But such former title, we apprehend from all the facts stated, was not the title and interest for which the plaintiff procured this policy. On the contrary, the policy was understood by all parties as intended to cover the interest of the insured in the equity of redemption of the Haynes mortgage held by Taylor. That was a sufficient interest and would have availed the plaintiff, had not that interest ceased prior to the happening of the loss. It seems that, by



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virtue of a power of sale contained in that mortgage, the property was legally sold on the 9th of August 1860 to Plummer and a deed duly executed to him by the mortgagee Taylor, dated the 9th of July 1860. With this transfer all the right of Taylor as mortgagee, and of the plaintiff as owner of the equity of redemption, ceased to exist, and the premises were held solely as the property of Plummer *Judgment for the defendants.*

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## Everett Burnham *vs.* City of Boston.

**If a travelled way, either public or private, over lots adjoining a public street in a city and leading into that street, for a long time before and after the existence of an excavation in the street, has been so much used by persons having occasion to pass as to become known as a common way for travel and to make it reasonably necessary for the city, in the exercise of due and proper care, to provide a barrier for the purpose of preventing travellers, who pass over such way from the adjacent lots into the street and use due care, from falling into the excavation, and the city have unreasonably omitted to erect such barrier, they are guilty of negligence and are liable for an injury happening to a traveller in the street by reason thereof.**

Tort to recover damages for an injury sustained by the plaintiff by reason of a defective way.

At the trial in this court, before *Chapman*, J., it appeared that Third Street, Athens Street and Broadway in South Boston were all public streets which the defendants were bound to keep in repair, running parallel to each other, and crossed at right angles by A Street and by the location of the New York Central Railroad. About the year 1854 an excavation was made for the track of this railroad, which was crossed by a bridge at Third Street and left open at Athens Street. Soon after the excavation was made, a fence was put across Athens Street about fifteen feet from the upper edge of the embankment, which has remained there ever since. Athens Street is twenty feet in width and was smooth and level throughout its whole width except between the fence and the excavation, where a gully was washed out.

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On a night in February 1862 the plaintiff took a close carriage in Boston to be driven to his home on Broadway in South Boston. The driver proceeded to the corner of A and Third Streets, then on Third Street to a point near the railroad bridge, then across private lots lying between Third Street and Athens Street, and on a level with them, for the purpose of going to Broadway by a route which crossed Athens Street near the excavation for the railroad; and as he was crossing Athens Street, at that point the carriage was precipitated into the excavation, and the plaintiff suffered a very severe injury. There was evidence upon the question whether the owners of the lots had or had not dedicated the travelled way across the same to the public. The plaintiff did not contend that a highway had ever been laid out from Third Street to Athens Street, and only two questions were argued, namely, whether the driver used due care, and whether a way had been dedicated to the public, so that the city were bound to close it at Athens Street or give notice that it was dangerous, according to *St.* 1846, *c.* 203.

The judge instructed the jury that if the owners of the lots had dedicated a highway to the public from Third Street to Athens Street, at the point where the plaintiff's carriage entered Athens Street, the defendants would be liable, because it was not denied that Athens Street was in a dangerous condition at that point, or pretended that the city had erected a fence there, or in any way closed the dedicated way or given notice that it was dangerous. He also instructed them upon what is necessary to constitute a dedication to the public; and added that if there had been no dedication of this way the defendants were not liable to the plaintiff; that it was admitted by the plaintiff that the fence across Athens Street was sufficient to prevent persons who were travelling on the street towards the railroad from falling into the excavation; and though the defendants were bound to protect such travellers by closing up the defective part of the street, they were not bound to protect travellers coming upon the street within the inclosed part of it where the dangerous place existed; and that when a part of a street is closed up because it is dangerous, the city are not bound to close it laterally against

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parties who may enter upon the dangerous part from private lots that adjoin it.

The jury returned a verdict for the defendants, and the plaintiff alleged exceptions.

*G. A. Somerby*, for the plaintiff.

*J. P. Healy*, for the defendants, cited *Sparhawk* v. *Salem*, 1 Allen, 30; *Smith* v. *Wendell*, 7 Cush. 498; *Shepardson* v. *Colerain*, 13 Met. 55.

Bigelow, C. J. This case was submitted to the jury under instructions which seem to have been carefully considered by the learned judge before whom the trial was had. With one exception, they were in all respects accurate and well adapted to the facts in evidence. But, upon mature deliberation, the majority of the court are of opinion that they embraced one element which ought to have been excluded.

The plaintiff's right to recover was made to depend on proof of the fact that a way across the land lying between Athens and Third Streets had been dedicated to the public, and the jury were told that unless such dedication was proved the city could not be held liable in this action. This, we think, put a limitation on the liability of the defendants not warranted by the rules of law. The instruction assumed that where a defect exists in a highway it is in all cases a sufficient exercise of due and reasonable care on the part of the city or town to place barriers or to prevent by other means the use of that portion of the way where the defect exists, by persons who enter upon the way from intersecting streets, or who pass over it in the line of direct travel, and that no action will lie for damages occasioned to those who enter on the way from adjacent lands over which there is no public way.

As a general proposition, without qualification, this instruction cannot be supported. It rests on a postulate which is inconsistent with the well established rule of law, that a city or town is liable for injuries done to any person using a public way with due and reasonable care. Certainly it cannot be said that it is *per se* negligence for a person to enter from adjoining houses or lands on a defective and dangerous part of a way, who has no

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knowledge of the defect or want of repair, nor any notice that it had been closed against public travel by barriers erected in another place to prevent the use of the way by those coming upon it either in the line of direct travel or from intersecting streets. Nor can it be maintained that a city or town would in all cases fulfil the duty incumbent on it by law by merely placing barriers across a street or way to protect travellers from injury by an existing defect or want of repair, without adopting any measures to guard against accident to those who might have occasion lawfully to come on the dangerous portion of the way from private lands adjoining and lying within the limits which were closed against travellers approaching in other directions. Doubtless in many cases it would be a proper exercise of due and reasonable care to place a single barrier across a way or street which was defective and dangerous, sufficient to stop persons from passing over it by the usually travelled path. Such a precaution, for example, would be an adequate protection against accident on a highway in the country, which was not wrought for travel throughout its entire limits, or in places where the adjoining lands were so fenced by the owners or natural obstacles were so interposed that access to the way laterally was either unusual or difficult. But a very different standard of diligence would be applicable where a way or street was within the limits of a populous city or town, and was prepared for travel and actually used in every part, and to which constant access was had from private ways over lands of adjacent proprietors, entering it at the side. The truth is, that due and reasonable care cannot be defined by any abstract proposition which will be appropriate and applicable to every case which may arise. It must necessarily vary with the circumstances under which the duty of exercising it is imposed. Nor is there any positive rule of law which requires a person to enter on a highway in any particular manner or at any fixed place, or which prescribes the exact mode in which he shall travel upon it. The right of a traveller to use it, and the duty of a city or town to protect him from danger and accidents, are regulated and measured by a like standard. Each must use such reasonable care as is adapted to the time, place and

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circumstances under which the right is to be exercised and the duty performed.

Applying this familiar principle to the case at bar, it is apparent that the instructions were too restricted in their application to the facts in proof, and did not state with sufficient clearness and accuracy the duty which devolved on the defendants. The evidence offered by the plaintiff tended to prove that the lots adjacent to that part of Athens Street which was defective and dangerous were on a level with the street, and that by license or acquiescence of the owners of these lots there was much public travel which passed over them, entering from Third Street and coming out on Athens Street, in the immediate vicinity of a deep excavation in the latter street, into which the plaintiff was precipitated. The plaintiff was guilty of no unlawful act in passing across these lots and in entering from them into the street. If it was known to the defendants that a large amount of public travel came from these lots and entered Athens Street laterally, so that, after coming within the limits of the street, a person using due care was exposed to the risk of accident in consequence of such defect, then it was incumbent on them to take suitable measures to protect travellers so entering the street in like manner as they had done to guard against injury to those who came in other directions towards the place where the defect existed. It was immaterial whether travellers entered the street and were lawfully upon it by passing over private or public ways. In either case it was the duty of the defendants to take reasonable care to keep the way safe and convenient. It was not therefore correct to say, without qualification, that the city was not bound to use any measures to guard against injury to those who came upon the street from a private way over adjacent lots, upon that portion which was inclosed by barriers. The proper direction to the jury on this part of the case, as applied to the facts in proof, would have been to instruct them that if there was a travelled way, either public or private, over lots adjoining Athens Street and leading into that street, which, for many years previously to the existence of the defect, and subsequently, was so much used by persons having occasion to pass

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there in carriages as to become known as a common way for travel, and to render it reasonably necessary for the city, in the exercise of due and proper care, to provide a railing or barrier in Athens Street at the place where the accident happened, for the purpose of preventing a traveller coming over such way from adjacent lots, and using due and reasonable care, from falling into the excavation in the street, and if the city unreasonably omitted to erect such barrier or railing, they were guilty of negligence, and the plaintiff would be entitled to recover in this action the damages which he had suffered by reason of such neglect. In this view, the question of the dedication of the way was wholly immaterial to the issue before the jury. The right of the plaintiff to recover did not depend upon it. Inasmuch as it was made an essential element in the plaintiff's case by the instructions under which the case was submitted to the jury, we are of opinion that there was a mistrial, and that the case must go back to be again tried under instructions substantially like those hereinbefore stated. *Exceptions sustained.*

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## Chauncey Page *vs.* Charles Ranstead.

If a submission to arbitration, in addition to a statement of the matter submitted, contains the facts out of which the question arose, and the grounds on which each party relies, and the arbitrator, being at a distance from the parties, writes to the party sought to be charged, inquiring if it is the wish of the parties to meet him in person and state their own cases, or if he should decide the case from the facts signed by them, and informing him that the other party will be there at a specified time, and that party replies to the arbitrator that he expects to have a hearing, and, as it is not convenient for him to meet the other party at the place of the arbitrator's residence at this time, he will try and state his side, and thereupon proceeds to state his views, this may be taken as a waiver of a further hearing, and the arbitrator is authorized to consider the case and make his award.

A. and B., in a submission to arbitration, stated that B. had agreed to furnish and deliver to A. a raft of pine timber at a specified price; that at the time of making this contract B. made an agreement, to which A. was a witness, with another person to get out the timber; that the third person failed to get out the timber; that B. claimed that by general custom in that region the failure of the third person absolved B. from his agreement, which A. denied; and that the question for the arbitrator to decide was, "Has A. a claim on B., and if so, to what amount?" Some months afterwards the arbitrator wrote to B. asking if it was the wish of the parties to meet him in person and state their own cases or if he

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Page v. Ranstead.

should decide the case from the facts signed by them, and informing him that the other party would be there at a specified time. B. replied, that he expected to have a hearing, and as it was not convenient for him to meet the other party at the place of the arbitrator's residence then, he would try and state his case; and he thereupon proceeded to state his views of the case. *Held*, that this might be taken as a waiver by B. of a further hearing and that the arbitrator was thereupon authorized to consider the case and make his award.

CONTRACT upon an award, rendered under the following submission to arbitration:

"Boston, June 30th, 1863. It is hereby understood and agreed that we are to refer our contract for timber, made at Marietta, Pennsylvania, in the summer of 1862, to Mr. F. M. Bingham, of Camden, N. J., with the following understanding and explanations: The terms of the contract were, that Mr. Ranstead was to furnish and deliver in Baltimore a raft of pine timber, equal in quality to a sample raft of Patchen Timber, for which Mr. Page was to pay thirteen cents per foot. At the time of making this contract Mr. Ranstead made an agreement, to which Mr. Page was a witness, with another party, to get out the timber for the next season. This third party failed to comply with his agreement. The only matter of question is, concerning the interpretation of this contract. Mr. Ranstead claims that, by general custom in that section, the failure of the party with whom he agreed to get out the timber to comply with his trade absolves him from the original contract with Mr. Page. Mr. Page argues that he does not, nor at the time did, so understand it, and considers that he has a fair claim for damages on Mr. Ranstead. The question for Mr. Bingham to decide is, Has Mr. Page a claim on Mr. Ranstead? If so, to what amount? Chauncey Page, Charles Ranstead."

The award, dated at Camden, New Jersey, October 24th 1863, was that the plaintiff should recover $360 of the defendant.

At the trial in the superior court, before *Allen*, C. J., there was no evidence of any hearing of the plaintiff's case by the arbitrator; and it appeared that the only hearing of the defendant's case consisted in the following correspondence: —

"Camden, Sept. 28th, 1863. Chas. Ranstead, Esq., Fallen Timber, Cambria Co. Pa. Dear Sir: Mr. Chauncey Page has

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sent to me an article of an agreement, which is left to me for adjustment, made in 1862, for a raft of bill timber. Is it the wish of you and him to meet me in person and state your own cases; or shall I decide from the facts in statement forwarded to me, and signed by both parties? Mr. Page will be here the last of this week. Please answer by return mail. Yours, respectfully, F. M. Bingham."

"Fallen Timber, Pa., Oct. 7th, 1863. F. M. Bingham, Esq.: Dear Sir: I received yours of the 28th ultimo, contents noted Of course, I expect to have a hearing in relation to my agreement with Mr. Page, and, as it is not convenient for me to meet him at your place at this time, I will try and state my side as I understand it. In the spring of 1862 Mr. Page bought of Mr. Patchen a raft of bill timber. I asked him if he would like one like it the next spring; and we made a bargain, founded on practicability. I at the same time made a bargain with a man to make the timber, and he never came to make it, and I could not get any one else to make it, consequently I could not deliver it. Mr. Page talks about damage; he knew that I had not taken out the timber, and if he had been anxious about it he could have bought several rafts of bill timber of Mr. Churchman at twelve cents per foot, which was a cent less than he was to pay me. I have known several bargains for timber to be delivered, and when it was not practicable to deliver it — say, no snow to haul on, or no flood to run it on — I never knew damage to be claimed or paid. If I had taken out the timber and run it and sold it to another party for more, then he might said something about damages; but as I done all I could to get the timber, and did not succeed, I think he has no claim. You are to decide. Yours in haste, Charles Ranstead."

Upon these facts, the chief justice ruled that the letter of the defendant did not authorize the arbitrator to decide the case without a further hearing, or giving an opportunity to the defendant to be heard further, and directed a verdict for the defendant. The plaintiff alleged exceptions.

*B. Dean*, for the plaintiff.

*A. Churchill*, for the defendant.

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HOAR, J. There is no question of the correctness of the general proposition, that when a case is submitted to arbitration, it is the duty of the arbitrator to give the parties an opportunity to be heard, if they desire it, before making an award. But it is equally clear that the parties may agree to submit their case without argument, either upon facts agreed, or upon the supposition that the facts are sufficiently within the knowledge of the arbitrator; or that either party may relinquish his right to a hearing.

Whether this right has been waived by the defendant is the point to be decided upon this bill of exceptions; and it is not free from difficulty.

The submission to arbitration is a peculiar one. It contains not merely an agreement to refer, and a statement of the question upon which the parties were at issue, but a statement of the facts upon which the question arose, and the grounds of the plaintiff's claim, and of the defence. It appears by the correspondence that the arbitrator was in doubt whether the parties expected to be heard farther, or had submitted the facts and arguments upon which they respectively relied in writing. And we think the doubt was not unreasonable. He asks the defendant, distinctly, whether they wish to meet him in person and state their cases, or to have him decide from the facts already submitted in the written statement; and suggests a convenient time for the hearing, if a hearing is desired. It was the duty of the defendant to answer this question explicitly. He replies, "Of course I expect to have a hearing;" and if he had stopped there, the arbitrator would have understood that he desired to be present and state his case. But he goes farther, and in answer to the suggestion that the plaintiff was soon to be at the arbitrator's place of residence, he adds: "As it is not convenient for me to meet him at your place at this time, I will try and state my side as I understand it;" and proceeds with a statement and argument for the defence. He closes his argument with the sentence, "You are to decide."

What is the just interpretation to be given to this letter? A majority of the court are of the opinion that it is susceptible of no other reasonable construction than that which the arbitrator

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gave to it; and that it was in effect, and was intended to be, a waiver of any right to a farther hearing in the case.

No other time or place for a hearing is suggested as convenient or desirable. If the defendant expected a personal hearing afterward, he certainly had no right to argue his case by letter. He "states his side" in writing for the expressed reason that it is not convenient to attend personally at the time intimated, though not absolutely appointed, by the arbitrator. For what proper purpose could this statement have been made, if he had expected or wished a time and place to be afterward designated for presenting his case?

The natural effect of his language seems to be this. "I do not intend to leave my case upon the original submission. I wish to be heard. But as the time you suggest for a hearing is not convenient to me, I do not ask you to fix another, but will now put in writing all I have to say. Upon this statement and argument I submit the case to your decision."

With this view of the defendant's letter, the arbitrator was right in proceeding to make the award, and the exceptions are sustained.

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ALBERT L. MURDOCK *vs.* JOSIAH CALDWELL.

An averment in a declaration that the defendant has disabled himself from performing a contract does not show with sufficient legal certainty that he has not performed it.

A contract by which B. agrees to deliver to A., upon the formation of a certain corporation, a certain amount in the stock of the same, "at *pro rata* of $250,000 valuation," and A., in consideration of the delivery of said stock, agrees to sell and collect a certain amount of the stock, upon the above valuation, does not imply that the capital stock shall be limited to the amount named, nor does the organization of a corporation with a larger capital stock disable A. from performing his part of the contract.

CONTRACT. After the decision of this case reported in 8 Allen, 309, sustaining a demurrer to the declaration, the plaintiff filed the following amended declaration:

"And the plaintiff says that the defendant was about to establish a corporation by the name of the Lorberry Coal Company,

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and was desirous of procuring subscriptions for the capital stock of said company and a sale of said stock, and in consideration that the plaintiff would obtain subscriptions for said stock and sale thereof, to the amount of fifty thousand dollars, and would also cancel an agreement made by the defendant with the plaintiff for a sale of certain other stock in the Franklin Coal Company, the defendant promised that, upon the formation of said Lorberry Coal Company, and when the certificates of stock in said company were issued, and upon the sale by the plaintiff of fifty thousand dollars of said stock, upon the valuation of two hundred and fifty thousand dollars for the whole stock of said company, and upon collection of payment for said stock, the defendant would deliver to the plaintiff thirty-five thousand dollars in said stock, at the valuation aforesaid, being at the rate of one hundred dollars per share for twenty-five hundred shares. And the plaintiff further says that the defendant signed a memorandum of the contract between them, a copy whereof is annexed, and delivered the same to the plaintiff, and the plaintiff accepted the same and promised to procure and afterwards did procure the subscriptions and made sale of said stock to the amount of fifty thousand dollars, at the valuation aforesaid, and was ready to perform the contract on his part at and before the time fixed in said memorandum. And the plaintiff further says that, after he was ready to perform said contract on his part, the defendant notified him in writing not to sell over twenty-five thousand dollars worth of said stock in all, nor to sell any of said stock at less than seventy-five dollars per share, at a par value of one hundred dollars a share for four thousand shares; and the defendant further notified and informed the plaintiff in writing that he had arranged to sell all his, the defendant's, stock in said company, except twenty-five thousand dollars thereof in value. And the plaintiff further says that afterwards said coal company was formed, and the defendant caused the stock thereof to be expanded from twenty-five hundred shares at a par value in the whole of two hundred and fifty thousand dollars, to four thousand shares at a par value of four hundred thousand dollars. And the plaintiff further says that said

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Lorberry Coal Company was organized and the certificates of stock therein issued, but upon a much larger valuation than twenty-five hundred shares, at one hundred dollars per share. And the plaintiff further says that, by the acts aforesaid of the defendant, the defendant disabled himself from performing his said contract, and prevented the plaintiff from performing the same and the plaintiff also says, by the formation of said company upon a larger valuation of its stock than that provided for by said contract, he has been prevented from performing the same."

(Copy of Contract.)

"Boston, May 23, 1863. I do hereby agree to deliver to Albert L. Murdock, upon the formation of the Lorberry Coal Company, when the certificates are issued, thirty-five thousand dollars in the stock of said company, at *pro rata* of $250,000 valuation; and he does, in consideration of the delivery of said stock, agree to sell and collect $50,000 of said stock upon the value above referred to, viz. $250,000; and he is to receive a reduction *pro rata* from said $35,000, if he falls short of that amount, $50,000, in cash subscriptions; this stock to be sold and paid for by 25th of June 1863, if the company is formed by that date. Josiah Caldwell."

The defendant filed a demurrer, assigning various special causes; and the case was reserved for the determination of the whole court.

*C. W. Huntington*, for the defendant.

*W. S. Leland*, for the plaintiff.

CHAPMAN, J. The original declaration having been held bad on demurrer, (see 8 Allen, 309,) a new declaration has been filed, and this is also demurred to. A copy of the contract is annexed to the new declaration, and new averments are made in respect to it.

A defect of this declaration which is apparent at first sight is, that it does not allege a breach of contract by the defendant. It alleges that he disabled himself from performing it, and prevented the plaintiff from performing it on his part. From this it might be inferred that the defendant did not perform; but

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allegations in pleading must be direct, and are bad if they depend on mere inference. This however is not one of the most material causes of demurrer, and might be cured by amendment. Other causes involve the cause of the action itself, and make it necessary to construe the contract declared on.

The obscurity of the phraseology which the parties have selected embarrasses us in our attempts to construe the contract, and must have been embarrassing to the pleader in framing his declaration. As we understand the contract, it contains four distinct clauses. The first clause contains a general statement of the compensation which the plaintiff was to receive. It was to be a certain proportion of the whole capital stock of the company, but we do not think it stipulates for a limitation of the whole capital stock to the sum of two hundred and fifty thousand dollars. The second clause states the service which the plaintiff was to perform. We do not understand that clause to stipulate for any limitation of the capital stock; but it states what proportion of the whole stock the plaintiff might sell. The third clause fixes his compensation if his sales should not be equal to the amount mentioned in the second clause. The fourth clause limits the time within which the sales were to be made.

Our practice requires that a declaration shall state the substantive facts necessary to constitute the cause of action with substantial certainty. In this case, the consideration of the defendant's contract is the executory contract of the plaintiff. In declaring on such a contract at common law, it was necessary for the plaintiff to aver performance on his part, or a readiness to perform, together with a statement of facts which would constitute a legal excuse for non-performance, and generally the offer to perform or notice to the defendant. 1 Chit. Pl. 351, *et seq.* These being matters of substance, the averments are as necessary now as they were before the statute.

In this case the plaintiff's agreement was not only to sell stock, but to collect the pay for it. The declaration does not allege that he performed this contract, or offered to perform it, or gave notice of readiness to perform it; nor does it set forth any facts which constitute a legal excuse for non-performance. The

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excuse alleged is, that the company fixed their capital stock at a larger sum than $250,000. But by our construction of the contract such an act was not in violation of the contract or inconsistent with it, and therefore did not constitute a valid excuse. The allegation that this act disabled the plaintiff from performing the contract is founded upon a misconstruction of the contract. This point seems to be decisive of the merits of the case, and it is not necessary to discuss the other points which have been argued. *Demurrer sustained.*

GEORGE W. GERRISH *vs.* ABIGAIL W. SMYTH.

If a sale of land has been made, under a power of sale contained in a mortgage, for less than the amount of the mortgage debt, and the mortgagee, after receiving the full amount of the balance due from the mortgagor executes to him a bond with condition to indemnify and save him harmless from all damage, loss or prejudice arising from the debt and mortgage, and from the sale of the land, and all expenses and damage that may arise in consequence of said sale, the condition of the bond is not broken so long as the mortgagor is not disturbed in his possession of the land, or in any way molested or put to expense.

CONTRACT upon a bond executed by the defendant to the plaintiff on the 17th of June 1856, the condition of which was as follows:

"The condition of this obligation is such that, whereas said George W. Gerrish did on the first day of July A. D. 1852 make a certain promissory note for the sum of fourteen hundred dollars, payable to the order of the said Abigail W. Smyth in three years after date with interest semi-annually, which note was secured by a power of sale mortgage from said Gerrish to said Smyth on land and house in Mathews Street in said Chelsea, and whereas said land and house were sold to John W. Emerson of Boston in said county, Esquire, for the sum of five hundred dollars, and whereas a suit was afterwards brought in the name of said Smyth against said Gerrish, and is pending at the present term of the superior court of the county of Suffolk, to ecover a balance alleged to be due on said note and mortgage

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from said Gerrish to said Smyth, which balance and the full amount of which note said Smyth hereby declares to have been fully paid; now if the above bounden Abigail W. Smyth shall indemnify and save harmless the said George W. Gerrish from all damage, loss or prejudice arising from said note and mortgage, and from the sale of said land and house to the said John W. Emerson, and all expenses which may hereafter arise therefrom, and save the said Gerrish harmless from any damage that may hereafter arise in consequence of said sale as aforesaid, then this obligation shall be null and void; otherwise of full force, virtue and effect."

At the trial in the superior court, before *Morton*, J., the bond was put in evidence, and also the mortgage therein referred to, and a discharge thereof by the defendant on the 17th of June 1856, and the deed by the defendant as mortgagee to Emerson, in December 1855. The plaintiff also introduced evidence of demands made by him upon the defendant for a conveyance to him of the estate, and for the money paid by him to her in satisfaction of the mortgage.

Upon these facts the judge directed a verdict for the defendant, which was returned accordingly; and the plaintiff alleged exceptions.

*J. F. Pickering*, for the plaintiff.

*H. W. Paine & D. C. Linscott*, for the defendant.

Hoar, J. It is difficult to give any sensible construction to the bond declared on. It recites a debt due from the plaintiff to the defendant, secured by a power of sale mortgage; a payment of part of the debt by the proceeds of the sale of the mortgaged premises; payment of the balance due, and of the whole debt; and then the condition of the bond is that the defendant shall "indemnify and save harmless the plaintiff from all damage, loss or prejudice arising from said note and mortgage and from the sale of the mortgaged estate, and all expenses which may hereafter arise therefrom, and save the plaintiff harmless from any damage that may hereafter arise in consequence of said sale." In what way the mortgage or sale could prejudice the plaintiff does not appear. The previous payment of his lawful debt

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would not seem to be of itself a legal damage or loss. Perhaps the most sensible construction would be that if the estate was sold for less than its real value, or if the plaintiff could not acquire a good title without paying more than it produced toward payment of his debt, he should recover the difference; but of this we give no opinion. There was no proof at the trial which would raise the question.

As it was not shown that the plaintiff's possession of the land was disturbed, or that he had been in any way molested by reason of the note and mortgage since the execution of the bond, or that he had been put to any expense, as the mortgage debt was paid, and the claim of the defendant under it discharged on the record, we can see no breach of the condition.

*Exceptions overruled.*

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EDWARD R. SECCOMB & another *vs.* PROVINCIAL INSURANCE COMPANY.

A policy of insurance on a vessel from New York to ports in South America and thence to ports of discharge in the United States, with an indorsement thereon of "liberty to deviate by going to port or ports in Europe, by paying an equitable premium therefor," covers one round voyage, but does not include a distinct and independent voyage, having no connection with the general objects and purposes of the voyage insured; and in an action upon such a policy evidence is inadmissible to show a usage among commercial men and underwriters which permitted the making of intermediate voyages between the ports of Europe, under the protection of such deviation clause; or a usage, upon which policies have been issued and paid, and which gave to the language of such deviation clause a peculiar and technical sense, namely, the signification of the liberty to make such intermediate voyages; or a usage of trade and commerce by which American vessels at Constantinople, seeking return cargo from Smyrna or other Mediterranean port, in the interval between the discharge of the outward cargo and the season for obtaining cargo therefrom, make intermediate voyages; or to control the legal meaning of such deviation clause by proof of conversation, at the time it was written, between the underwriters and the assured.

CONTRACT on two policies of insurance, by which the defendants insured the plaintiffs' bark Nautilus from New York to Buenos Ayres and Monte Video, one or both, and thence to ports of discharge in the United States. The first policy gave



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"liberty of other port or ports, adding one quarter per cent. for each port used after the first used of the above two ports." The second policy gave "liberty of intermediate ports, by adding one quarter of one per cent. for each port used." Upon each policy the following indorsement was added: "Liberty is given to deviate by going to port or ports in Europe, by paying an equitable premium therefor."

At the trial in the superior court, before *Lord*, J., after the decision reported in 4 Allen, 152, it appeared by the deposition of the master, Captain Paine, that the vessel sailed from New York on the 29th of July 1854 for South America; that from Buenos Ayres he went to Rio Janeiro, seeking business, where he chartered her to load coffee for Malta and Constantinople, and sailed for Malta about the 9th of January 1855; that he discharged part of his cargo at Malta, and then proceeded to Constantinople, where he arrived about the 14th of April, and finished discharging his cargo about the 9th of May; that business was very dull there, and nothing was done of any consequence except transport business for the French government; that he obtained a charter from the French government to run between Constantinople and the Crimea, under which one trip was made to Kameish, in the Crimea, and the vessel returned to Constantinople about the 1st of August, and sailed thence for Smyrna, seeking business, about the 2d of August, where she took in a cargo for Boston, and sailed upon the voyage on the 9th of September 1855, and was lost off the American coast.

Edward R. Seccomb, one of the plaintiffs, testified that upon receipt of a letter from the master, on the 26th of February 1855, he went with the letter to the office of the defendants, and the indorsements upon the policies were then made.

The plaintiffs then offered to show the following facts:

1. That the witness read extracts from Captain Paine's letter to the defendants' agent, Captain Williams, and stated to Captain Williams that the vessel was going to Constantinople, and after her arrival would be seeking business, and would return to the United States by way of Smyrna or Leghorn; and that thereupon Captain Williams said, "Ports in Europe would

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cover," and directed the indorsements to be made in the present form.

The plaintiffs offered this evidence to show that the defendants knew the existence of the usage as to the meaning of the deviation clause hereinafter stated, and for all other competent purposes.

2. That on the 26th day of February 1855 the Nautilus was bound from Rio Janeiro to Constantinople, and would, on discharge of her cargo, be seeking business there; and that these facts were known to the defendants.

3. That when, upon a policy covering a voyage from the United States to port or ports in one quarter of the globe — say South America — and back to the United States, with a fixed premium for each port, there is indorsed, while the vessel is upon her voyage, a clause giving the vessel liberty to deviate by going to port or ports in another quarter of the globe — say Europe — by paying an equitable premium therefor, there is an established usage among commercial men, underwriters and other persons engaged in the business of insurance, which permits, under such deviation clause, the making of intermediate voyages between the ports of the quarter of the globe — say Europe — to which such deviation clause relates; that such usage existed when the indorsements upon the policies in suit were made, and that premiums were always paid and losses adjusted upon such policies, in conformity to such usage; the premiums in such cases being adjusted and paid at the return of the vessel to Boston or port of discharge in the United States, and being charged for every port visited, according to the risk incurred.

4. That there was, at the time of the indorsements upon the policies in suit, a well known and established usage among commercial men, underwriters and other persons engaged in the business of insurance in Boston, which gave to what is known as the deviation clause, to wit, "Liberty is given to deviate by going to port or ports in Europe, by paying an equitable premium therefor," a peculiar and technical sense, to wit, the signification of liberty to make intermediate or independent voyages in Europe; and that upon such technical sense and signification of

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the clause, policies have been uniformly issued, premiums paid and losses adjusted.

5. That by the usage of trade and commerce American vessels at Constantinople, seeking return cargo from Smyrna or other port of the Mediterranean, in the interval between the discharge of the outward cargo and the season for obtaining cargo from Smyrna or other Mediterranean port, make intermediate voyages.

These offers were rejected by the judge, who ruled that so much of the evidence offered as is competent does not show that the bark was protected on the intermediate voyage from Constantinople to the Crimea, and that she was protected at the time of the loss.

A verdict was thereupon taken by consent for the defendants, and the plaintiffs alleged exceptions.

*B. F. Thomas & G. F. Homer*, for the plaintiffs. The voyage to Kameish and back was within the policies. There is nothing on the face of them which limits the number of voyages. The added clauses allow not merely one deviation, but a series of deviations. The offers to show that this voyage was within the policy, because by an established usage among commercial men and underwriters it was permitted, should not have been excluded. In all commercial cases, the course of the voyage, the customs of trade and of insurance, and commercial usages, when reasonable and established, make part of the contract. The evidence was admissible upon the authority of many cases, and of the writers on marine insurance. *Salvador* v. *Hopkins*, 3 Burr. 1707. *Eyre* v. *Marine Ins. Co.* 5 Watts & S. 116. *Bulkley* v. *Protection Ins. Co.* 2 Paine C. C. 82. *Macy* v. *Whaling Ins. Co.* 9 Met. 354. *Moxon* v. *Atkins*, 3 Camp. 200. *Noble* v. *Kennoway*, 2 Doug. 510. *Child* v. *Sun Mutual Ins. Co.* 3 Sandf. R. 26. *Clark* v. *Baker*, 11 Met. 186. *Vallance* v. *Dewar*, 1 Camp. 503. 1 Phil. Ins. §§ 144, 981, 1003. 1 Marsh. Ins. 178. 1 Duer on Ins. 195, 196. 1 Park on Ins. 30. 1 Arnould on Ins. 43, 355. Hughes on Ins. 128, 130. 3 Kent Com. (6th ed.) 282, 309, 313. 2 Parsons Mar. Law, 56. The case of *Lowry* v. *Russell*, 8 Pick. 360, fully sustains the doctrine contended for. The

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offer to show the peculiar and technical sense attached to the deviation clause was admissible. The phrase used had acquired a peculiar and technical meaning, to which the law has given no interpretation. It is familiar law that in such cases evidence is received of such meaning. See *Eaton* v. *Smith*, 20 Pick. 150; *Dow* v. *Whetten*, 8 Wend. 160; *Houghton* v. *Gilbart*, 7 C. & P. 701; *Peisch* v. *Dickson*, 1 Mason, 9; *Coit* v. *Commercial Ins. Co.* 7 Johns. 385; *Astor* v. *Union Ins. Co.* 7 Cow. 202; *Fowler* v. *Ætna Ins. Co.* 7 Wend. 270; *Daniels* v. *Hudson River Ins. Co.* 12 Cush. 416, 429; *Brown* v. *Brown*, 8 Met. 576; *Wilkinson* v. *Greely*, 1 Curtis C. C. 63; *Two Hundred Chests of Tea*, 9 Wheat. 430, 438; *Barlow* v. *United States*, 7 Pet. 404, 409; *United States* v. *Casks of Sugar*, 8 Pet 277; 1 Smith's Lead. Cas. (5th Amer. ed.) 677; 1 Arnould on Ins. 63. In these cases, the evidence does not add to nor qualify the written contract; it only ascertains it by expounding the language. *Brown* v. *Byrne*, 3 El. & Bl. 703. *Cuthbert* v. *Cumming*, 10 Exch. 809; *S. C.* 11 Exch. 405. *Eaton* v. *Smith*, 20 Pick. 150, 156. *Hutchison* v. *Bowker*, 5 M. & W. 535. *Lethulier's case*, 2 Salk. 443. *Urquhart* v. *Barnard*, 1 Taunt. 450. *Crocker* v. *Mut. Ins. Co.* 8 Cush. 79. *Macy* v. *Whaling Ins. Co.* 9 Met. 354.

The proposed evidence that these usages were established, uniform and notorious, was in accordance with well settled principles. See 1 Greenl. Ev. §§ 277, 292; 1 Phil. Ins. §§ 138–144; *Smith* v. *Thompson*, 8 C. B. 44; *Clark* v. *Baker*, 11 Met. 186; *Winsor* v. *Dillaway*, 4 Met. 221. *Macy* v. *Whaling Ins. Co.* 9 Met. 354. The usages were reasonable. They tend to facilitate commerce, and are equally favorable to both parties. In a voyage policy, a deviation discharges the insurers. But by the usages now under discussion, the insurers permit voyages not defined, and receive their consideration. This is not unreasonable. The objection that the contract is interminable or indefinite would apply equally to other cases where similar policies have been sustained. *Thorndike* v. *Bordman*, 4 Pick. 471. *Eyre* v. *Marine Ins. Co.* 5 Watts & S. 116. *Grant* v. *Paxton*, 1 Taunt. 463. *Armet* v. *Innes*, 4 Moore, 150. *Hunter* v. *Leathley*, 10 B. & C. 858. Emerigon on Ins. 556. The contract was made for

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the usual and ordinary course of trade and mercantile business and not for extreme, improbable and extraordinary cases.

The first and second offers of evidence were also competent.

*R. H. Dana, Jr. & C. W. Loring*, for the defendants, cited, upon the admissibility of the usages, *Dickinson* v. *Gay*, 7 Allen, 29, and cases cited; *Hone* v. *Mut. Safety Ins. Co.* 1 Sandf. R. 137; *Rogers* v. *Mechanics' Ins. Co.* 1 Story R. 603, 607; *Blackett* v. *Royal Exch. Co.* 2 Crompt. & J. 244; *Crofts* v. *Marshall*, 7 C. & P. 597, 607; *Blazier* v. *Clap*, 5 Mass. 1; *Middlewood* v. *Blakes*, 7 T. R. 162; *Eliot* v. *Wilson*, 4 Bro. P. C. 470; *Taunton Copper Co.* v. *Merchants' Ins. Co.* 22 Pick. 108; *Hurst* v. *Usborne*, 18 C. B. 144.

Bigelow, C. J. If the policies declared on in this case are to be interpreted solely by the legal import and construction of the language used by the parties to express their meaning, without a resort to extrinsic evidence, there is no room for doubt as to the nature and extent of the risk which the defendants assumed. The original contract was for insurance on a voyage from New York to Buenos Ayres and Monte Video, one or both, and thence to a port of discharge in the United States, with liberty of other port or ports, adding an additional premium for each port visited after the vessel had been to either one of the two first named. By the well settled rule of construction, this phraseology aptly describes a round voyage from New York to Buenos Ayres and Monte Video and back again to a port of discharge in the United States, with the right to go to other ports between the *termini* named, in furtherance of the purposes of the outward or homeward voyage, and in prosecution of the real objects of the adventure originally contemplated by the parties.

The same rule of construction is applicable to the clause indorsed on the policies by which the original voyage was varied and changed by giving to the assured "liberty to deviate by going to port or ports in Europe, by paying an equitable premium therefor." Giving to this language the natural force and effect of the words used, unaided by extrinsic proof, the risk was still for a round voyage, but, instead of being limited to ports in South America and thence to a port of discharge in the United

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States, it was extended so as to embrace in the voyage insured a right to visit one or more ports in Europe. But this right, or "liberty," as it is termed in the policies, was to be taken and enjoyed in subordination to the principle that the port or ports which the assured might visit should be only those which were properly in the course of the voyage described, and in pursuance of the general purposes of the adventure or enterprise embraced within the *termini* designated in the policies. Certainly it is inconsistent with any fair and reasonable interpretation of the clauses in question to hold that they embrace, *ex vi termini*, a right to make distinct, separate and independent voyages, having no connection with the general objects and purposes of the voyage, either outward or homeward, named in the policies, but undertaken as new and intermediate voyages, having no reference to the accomplishment of the ultimate destination of the vessel or her port of discharge. Such an interpretation would convert a voyage policy, limited in the extent and duration of the risk insured to a particular adventure or enterprise, into a contract of insurance for an unlimited period of time, and upon risks the nature and extent of which neither of the parties to the contract could know or foresee. The only safe rule of construction is that which confines the meaning of a clause in a voyage policy giving liberty to touch at different ports to a permission to visit those only which are within the scope of the voyage insured. 1 Arnould on Ins. 369–380. 1 Phil. Ins. § 1007. *Stocker* v. *Harris*, 3 Mass. 409. *Bottomley* v. *Bovill*, 5 B. & C. 210; S. C. 7 D. & R. 702. *Solly* v. *Whitmore*, 5 B. & Ald. 45. *Kettell* v. *Wiggin*, 13 Mass. 68.

Nor do we think that this well settled rule of interpretation, in its application to this clause in the policies, is at all affected by the stipulation that an equitable premium is to be paid by the assured for the ports visited. This does not enlarge the risk or change the description of the voyage insured. It confers no right to visit additional ports not necessary or proper to promote the general purposes of the adventure or enterprise which is designated by the *termini* of the voyage named in the policies. It is inserted for a different purpose. Inasmuch as the port or ports

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which may come within the scope of the voyage are necessarily uncertain, being dependent on the exigencies which may arise in the prosecution of the original enterprise, and as the risks to be incurred cannot therefore be accurately estimated beforehand so as to enable the parties to stipulate for an adequate premium in anticipation, the purpose of this clause is to leave the premium to be adjusted after the course of the voyage has become known, so that it may be regulated according to the risk actually incurred. This interpretation fully satisfies the language of the stipulation, without introducing any element of uncertainty into the nature or extent of the risk assumed. It is the premium only which is uncertain. The risk is limited by the scope and purposes of the voyage described in the policies. It is a mistake, therefore, to say that the clause in question gives general liberty to go anywhere in Europe, at the pleasure of the assured, on paying an equitable premium. Such might be the interpretation if the policies contained no words descriptive of any particular voyage, but were in terms only to port or ports in Europe. But these words are to be taken in connection with and as part of the other clauses in the policies, which describe the risk assumed by the defendants, as a voyage commencing in the United States and ending by the return of the vessel to her port of discharge in this country.

The plaintiffs, feeling the force of this view of the interpretation of the policies, seek to escape its effect by evidence of mercantile usages by which they propose to vary and control the written words, and to give to them a different meaning from that which results from their natural import, as expounded and established by the general current of judicial decisions. It is an admitted fact that the vessel insured, after leaving Rio Janeiro whither she had gone in prosecution of the voyage, seeking business, sailed thence, bound for Constantinople with a cargo of coffee, at which port she arrived and discharged her cargo. In consequence of the dulness of trade and the inability of the master to obtain immediate and profitable employment of the vessel in the regular course of the voyage towards her final destination at a port of discharge in the United States, he

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entered into a charter party with the French government, under which he made a voyage to Kameish, in the Crimea, and back again to Constantinople. This was a distinct and independent voyage, having no connection with the accomplishment of the original voyage described in the policies, and not being undertaken in furtherance of the ultimate object of reaching the port of discharge in the United States. By the rule of construction already stated, this intermediate voyage was a deviation, and avoided the policies, unless the plaintiffs can be permitted to prove the usages alleged by them to exist, and by which such independent voyages are deemed to be embraced within the description of the adventure or enterprise originally contemplated by the parties, as set forth in the written words in the policies and the indorsements thereon.

There can be no doubt that, in the interpretation of written contracts, especially those of a mercantile character, evidence of usage is competent and frequently admitted, to explain the sense in which particular words or phrases are used, and to show that, as applied to the subject matter, the language of the instruments was understood by the parties to have a special and peculiar meaning, differing from that which might ordinarily be attributed to it. Especially is this true in respect to policies of insurance. These contracts, like others of a mercantile nature, when first introduced as subjects of exposition in the courts of common law, contained many loose, undefined and indeterminate words and phrases, which, if interpreted literally, and without reference to the course of trade and the customs of merchants, would have increased the risk assumed by the insurers or abridged the indemnity secured to the assured, contrary to the real intentions of the parties. But it is obvious that the necessity which gave rise to the liberal rules which have heretofore been adopted by courts of justice in admitting usages as explanatory of this class of customs has in great measure ceased to exist. By a long course of judicial decisions, that which was originally indefinite and uncertain and difficult of application in the language of the instrument has become clear, determinate, and well settled. The consequence is, that of late years, the

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tendency of courts of law has been to apply the rules regulating the competency of usages to explain and interpret the language of written instruments with great strictness, and to guard with increased vigilance against the danger of allowing extrinsic evidence to vary or control the words in which the parties have deliberately expressed their meaning. Many of the early authorities in England and in this country go much farther in the admission of testimony to prove usages for the purpose of aiding in the interpretation of written contracts than would be deemed to be reasonable or safe at the present day. We are inclined to doubt whether in any case it would now be deemed to be competent to offer evidence to show that a description of a voyage in a policy which is susceptible of a clear and definite exposition in conformity to the interpretation of the words as established by adjudicated cases has another and different meaning by mercantile usage from that which has been so recognized and settled.

But we have no occasion in the present case to express a decided opinion on so broad a proposition. On careful consideration, it seems to us that the usages set up by the plaintiffs are wanting in an essential element, without which they can have no validity. One of the cardinal rules by which the recognition and application of usages in courts of law is governed is, that they must be reasonable; that is, such that, if incorporated into the contract, and as applied to the subject matter, they would be just and appropriate stipulations, and not calculated to throw heavy and disproportionate burdens upon either party. A mercantile usage, in order to be received as explanatory or in aid of the exposition of a policy of insurance, must not on the one hand tend to increase excessively or indefinitely the risk assumed by the insurers, nor on the other hand unreasonably to deprive the assured of the indemnity which the words of the contract, fairly interpreted, would secure to him. If a usage leads to consequences which are absurd or which could not be fairly presumed to have been contemplated by the parties, the presumption is repelled, which the law might otherwise make, that it was intended to be adopted as part of the contract. Therefore courts

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of law will not enforce unreasonable or absurd usages, however uniform and well known. Parties in framing their contracts have a right to disregard them, and cannot be held to have entered into written stipulations with any reference to them.

Examined in the light of these familiar principles, it seems to us that the usages on which the plaintiffs mainly relied to avoid the effect of the alleged deviations cannot be supported. In the first place, these usages, if adopted, would enlarge the voyage insured, as described in the policies, and which the parties actually had in view when the insurance was effected, to an unreasonable extent, and would thereby increase the risk cast upon the underwriters beyond that which could have been contemplated when the contract was entered into. The real adventure or enterprise which the parties intended to insure at the time the liberty to go to port or ports in Europe was indorsed on the policies, as appears by the deposition of the master and the testimony of one of the plaintiffs, was what is usually called a Mediterranean voyage — that is, a voyage to Malta and Constantinople, and thence to other ports in the Mediterranean, in order to obtain a return cargo to a port of discharge in the United States. This was the voyage comprehended within the description in the written contract. Taking this description by itself, it is obvious that the risks attendant upon such an adventure could be readily anticipated by the insurers. They knew the seas which the vessel was about to visit, and the perils of navigation to which she was likely to be exposed. They therefore had the means of estimating without difficulty, at the inception of the risk, the nature, extent and probable duration of the voyage — essential elements necessary to enable them to form a judgment of the risks which they were about to assume. But these would be wholly wanting, if the usages relied upon by the plaintiffs are competent and admissible to vary and control the language of the policies. Not only would the insurers be ignorant of the probable course of the vessel, but they would be able to ascertain nothing concerning the risks which might be cast upon them during the time the policies remained in force. If the right to make intermediate voyages, separate and distinct from the main

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voyage described in the policies, can be engrafted on the contract the destination of the vessel and the risks to which she may be exposed are necessarily left in uncertainty. They must depend in great measure on the course of trade, the fluctuations of markets, and other causes affecting the interests of the insured. Indeed, the effect of the usages in question as applied to the subject matter would be to give to one party to a contract the right to determine the extent of the obligation or duty which was to be borne by the other. It would be left solely to the insured to decide whether the terms of the contract should be extended and the risks increased by adding new, distinct and independent voyages, not embraced within the terms of the written agreement of the parties. It would be in his power to vary the risks indefinitely, according as the exigencies of commerce and his own interest might prompt him to seek new employment for the vessel. Thus it might happen that a vessel originally insured on a voyage to a portion of a quarter of the globe lying within the lower latitudes, where the seas were not tempestuous, and to ports there situated, in visiting which the vessel would be exposed to few and inconsiderable perils, might be sent by the assured, without the knowledge or assent of the underwriters, on new and distinct voyages to higher latitudes and stormy seas, where the navigation would be difficult and dangerous, and the perils to be encountered would be not only different, but much greater than those incident to the original voyage described in the policy. The case at bar itself furnishes a good illustration of the extent to which the written words might be enlarged, and the liability of the insurers increased, if evidence of such usages as those relied on by the plaintiffs is competent to add to the written words of the contract. It would then follow that the plaintiffs might have sent their vessel under the protection of the policies, not only to ports in the Mediterranean and in adjacent seas, but to ports in the North Sea and the Baltic, or even into the Arctic Ocean. Usages which might operate so entirely to change and extend the risk which the parties had in view and which formed the subject matter of the contract at its inception cannot be regarded as being such that they should receive the sanction of a

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court of law as just and reasonable in their effect on the rights of parties.

But there is another and equally serious objection to the recognition of the usages in question. They do not merely allow the assured to vary the voyage and to change and increase the risk by extending it to a single new adventure or to a series of additional voyages of limited duration, but they engraft on a policy which describes a single round voyage, capable of being completed in the usual course of navigation within a period of a few months, the right to go upon any number of distinct and intermediate voyages which the assured may deem it expedient or profitable to make, and thus to extend the contract of insurance indefinitely, so as to cover voyages during any number of years, and thus to render the contract terminable only at the will of the assured. A usage which may lead to such an absurd consequence is one which of itself repels the presumption that the parties entered into the contract with reference to it. However uniform and notorious it may have been, the insurers had a right to disregard it, as imposing on them a burden disproportionate and unreasonable, and which they could not be compelled to take upon themselves by force of legal implication only.

Upon examining the cases which have been cited by the counsel for the plaintiffs, as most analogous to the case at bar, in which extrinsic evidence has been admitted to vary the description of a voyage, as set out in the policy, we do not find that any of them go to the extent of upholding usages such as are relied on to justify the deviation in the present case. The leading decisions are those which were made in relation to insurances on ships engaged in voyages to the East Indies, under charters to the East India Company. The first are *Salvador* v. *Hopkins*, and *Heaton* v. *Rucker*, 3 Burr. 1707. In these cases, evidence of a usage to make intermediate voyages, commonly called "country voyages," between ports in the East Indies and China, after the arrival of the ship in India, was admitted to explain the description of the voyage in the policy. But the usage in these cases was limited to voyages to ports situated in the same countries with those specified in the policies, and

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within the same degrees of latitude, and the additional risks thrown upon the insurers were similar in kind and degree with those specified in the policies. Nor were the intermediate voyages indefinite in number or duration, so as to allow the assured to extend the policy for an unlimited time. The usage was expressly confined to the detention of the ship beyond the voyage named in the policy for one year only. It may be also added that these cases did not turn on evidence of usage only. There were many additional facts and reasons to support the decision, especially the very broad language used in the policies to describe the voyage insured, and the fact that the underwriters waived all objection by acquiescence in the intermediate voyage, which was known to them before the insurance on the vessel was effected, so that they were shut off from setting up as a defence that they were not expressly told at the time of underwriting that a new and intermediate voyage was to be performed. The cases of *Gregory* v. *Christie* and *Farquharson* v. *Hunter*, reported in Park on Ins. 83, 84, seem to have in part turned on the same usage in relation to voyages under charters to the East India Company as that referred to in the cases just cited. The report of the cases is meagre and imperfect; but it appears that the usage set up was limited to intermediate voyages in the same seas as those named in the policy, and did not extend so as to include voyages which would continue beyond the period of a year from the time when the voyage named in the policy would have terminated. The case of *Noble* v. *Kennoway*, 2 Doug. 510, arose on a policy of insurance on ships with cargoes bound on fishing voyages to Labrador, with liberty to touch at Newfoundland. The usage deemed to be admissible in this case was only to delay the discharge of a part of the outward cargo during a few months, while the vessels were engaged in catching fish; a usage which did not indefinitely prolong the risk assumed by the insurers of the cargo. So in *Vallance* v. *Dewar*, 1 Camp. 503, the usage was limited to the time usually occupied by vessels in fishing on the banks near the coast of Newfoundland — a period of only a few months. In *Eyre* v. *Marine Ins. Co.* 5 Watts & S. 116, the usage was not

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that the insurance would continue for an unlimited time, but merely until the termination of the voyage on which the vessel might happen to be engaged when the policy by its terms would have expired. In all these cases the usages which were the subject of judicial consideration did not authorize the assured to enter upon new and intermediate voyages to places far distant from the course of the voyage or from the ports named in the policy, nor to prolong the risk of the insurers indefinitely, and to render it terminable only at the pleasure of the assured. We have found no case which recognizes the validity of such a usage. On the contrary, in *Ougier* v. *Jennings*, 1 Camp. 505, *n.*, Lord Eldon instructed the jury that if evidence of a usage "leads to this, that the ship may make an intermediate voyage of several years, it is too dangerous for you to give it effect."

No doubt there are cases in the books where policies have been sustained and enforced by courts of law in which the risks assumed by the underwriters have been expressed in such terms that a just interpretation of the language has cast on the underwriters a very broad and unlimited liability. Some cases of this nature are cited by the learned counsel for the plaintiffs. But they do not seem to us to have any bearing on the questions in contention here. The plaintiffs do not ask us to interpret the language which the parties have used, but to engraft on the contract, by extrinsic evidence, stipulations which the parties have not in terms entered into, but which it is said the law annexes to their contract. If parties have put their agreements in clear and explicit language, it is the duty of courts to enforce them, although they may lead to unreasonable and absurd results. But it is otherwise when stipulations are to be added or incidents annexed to contracts by implication arising from mercantile usages. Unless these usages can be supported as being just and reasonable, then they are to be rejected, however well established and clearly proved.

It is urged that the clause in the policies which provides that the assured are to pay an equitable premium for the port or ports in Europe which the vessel may visit secures to the insurers a full consideration for any risk to which they may be

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subjected in the course of the employment of the vessel, and that in connection with this clause the usages relied upon cannot be regarded as unreasonable, because an adequate premium must be paid for each intermediate voyage which the owner or master may perform, until the return of the vessel into the United States. But this suggestion does not meet the difficulty. The objection to the usages is not that the insurers may not obtain a compensation for the additional risks to which they may be subjected, but that they have no voice or right of election in determining whether they will incur them at all. If the usages are valid, it is the right of the holder of the policy to force on the underwriter without his knowledge or assent any number of intermediate voyages, or to send the vessel to any part of a continent, and thus to extend the policy indefinitely without any right or power in the insurers to terminate it. The anomalous and unreasonable feature of the usage is, that the nature, extent and duration of the risks are left to be determined by the assured, and that the underwriter is compelled to assume them, although, if he had the right of election, he would refuse to bear them at all for any premium, however large. There is no reason for supposing that the clause providing for the payment of an equitable premium for the port or ports which the vessel might visit was inserted with particular reference to the supposed usages. As has been already said, this stipulation was necessary and proper, and could have full operation and effect, if the voyage had been strictly confined to that originally contemplated and described in the language of the policies.

In what has been heretofore said, we have had reference to the two usages which stand first in order in the bill of exceptions. It may be well to add, that these usages contain no limitation of time within which the right of making intermediate voyages is to be exercised, nor of the places to which the vessel may be sent by the assured under cover of the policies, except that the voyages are to be confined to that quarter of the globe to which the vessel had the right to go by virtue of the description of the voyage inserted in the policies. In determining on the validity of these usages, therefore, we have considered them as

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existing exactly in conformity to the offers of evidence made at the trial. Whether, if modified and restricted as to time and place, they could be upheld, we have not felt called upon to decide. For aught that we can know, no such modification or restriction could be introduced consistently with the actual practice among merchants. The question which we have to determine is not whether a usage, sufficient to justify the deviation in the voyage insured, is reasonable and valid, but whether usages of a scope and operation so general and unlimited as those alleged at the trial can be supported as legal and binding on the parties to the contract. These were the usages which the plaintiffs allege that the defendants were bound to know, and with reference to which they made the contract declared on. They are therefore to be taken as a whole. The defendants could be required only to consider whether these usages, as they are alleged to exist, were unreasonable and oppressive, and if they were, they had a right to disregard them entirely, and they cannot be deemed to have incorporated them into the policies.

In regard to the usage set forth in the last offer of proof made by the plaintiffs at the trial, it is sufficient to say that it is not alleged to have been adopted or acted upon by parties in entering into contracts of insurance, or that policies have been taken or premiums paid or losses adjusted with reference to it. The offer was only to prove that American vessels at Constantinople, seeking a return cargo from ports in the Mediterranean, in the interval between the discharge of the outward cargo and the season for obtaining a return cargo, make intermediate voyages. But proof of such usage was immaterial, unless it could also be shown that it was acted upon in the business of insurance, and that such intermediate voyages were included in the description of the voyage contained in the policies. A usage to go upon intermediate voyages could avail the plaintiffs nothing, unless they could prove further that vessels were deemed to be protected while performing such voyages, by policies which did not in terms cover them. This the plaintiffs did not offer to show. *Taunton Copper Co.* v. *Merchants' Ins. Co.* 22 Pick. 102, 115 *Dickinson* v. *Gay*, 7 Allen, 29.



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The statements of the conversation between one of the plaintiffs and the defendants' agent at the time the indorsements were made on the policies were rightly excluded. No fraud, misrepresentation or concealment was alleged. The written contract was the sole evidence of the stipulations into which the parties entered. *Exceptions overruled.*

JOHN H. FARWELL & others *vs.* OZIAS H. MATHER.

A memorandum in writing agreeing to give a certain sum "for the whole property, from cellar to top, including lease, press, boiler and engine, type, fixtures, furniture," &c., and to pay a certain sum quarterly until the principal and interest are paid, and, "in addition, pay over the twelve hundred and fifteen dollars to be received from A. and the proceeds and good will of the 'Times,' all of which sums shall be deducted from" the gross sum to be paid, is not sufficient to take the contract out of the statute of frauds; nor can an action upon it be supported, by the addition of oral proof that the memorandum was intended to apply to an unexpired lease of a certain building, subject to a certain ground rent, in which building the press and other articles were situated and the "Times" newspaper was printed, and that A. had agreed and bargained with the vendor for a release and conveyance of a small portion of the land included in said lease for twelve hundred and fifteen dollars, and that there was no other building anywhere owned or held by the vendor under a lease to which the description would apply.

CONTRACT brought to recover damages for the breach of the following agreement:

"We will give you $16,500 for the whole property, from cellar to top, including lease, press, boiler and engine, type, fixtures, furniture, &c., and you are to protect us in the possession of the same from all parties. We will pay as follows: We will pay all ground rent and taxes, and pay you five hundred dollars quarterly until the principal and interest are all paid; we will, in addition, pay over to you the twelve hundred and fifteen dollars to be received from John C. Pratt, and the proceeds of the press and good will of the 'Times,' all of which sums shall be deducted from the sixteen thousand five hundred dollars. We to take the property free from all debts, except the above sum, and you to pay all other liabilities up to the time of transferring

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the same to us; except the ground rent from April 1, 1857, which we are to pay. J. H. & F. F. Farwell & Forest.

"I agree to accept the above proposition. O. H. Mather."

At the trial in this court, before *Hoar*, J., the plaintiffs offered to prove that this agreement was made and delivered on the 21st of April 1857, and that it was intended by the parties to apply to a lease from the owner of the fee of a building on State Street, Boston, which lease belonged to the defendant, and that of the term created by the said lease there remained eight years unexpired, and that the lease was subject to a ground rent, reserved by it to the owners of the fee; that in the building so leased there were a printing press, boiler, engine, types, fixtures and furniture, and that a newspaper called the "Times" was printed and published in said building; that John C. Pratt, before making said agreement declared on, had agreed and bargained with the defendant for a release and conveyance of a small portion of the land included in said lease, for which Pratt agreed to pay the sum of $1215; that at the time this agreement was made, it was contemplated by the plaintiffs and the defendant that the plaintiffs were to sell the good will of the "Times" newspaper and the press on which it was printed; that there was no other building anywhere, held or owned by the defendant by virtue of a lease, or in which he had any interest, which contained a press of any description, a boiler or engine, or types, or in which a newspaper called the "Times" was printed and published, or for any interest in which John C. Pratt was bound or had agreed to pay the defendant, or any one, $1215; and this evidence was offered for the purpose of showing to what property said agreement applied and referred. The plaintiffs also offered to prove that immediately after the execution of the agreement declared on they and the defendant went to an attorney, and directed him to make the proper conveyances to carry out said agreement, and that said conveyances were made and agreed to by both the defendant and the plaintiffs, in which said lease the "Times" newspaper press, boiler and engine, fixtures and furniture are fully described, but that said conveyances were not signed, merely because it was necessary

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to obtain the date of some paper referred to therein; and that, before the date was obtained, the defendant refused to perform his said agreement and sign and deliver said conveyances; and the plaintiffs produced said conveyances and offered them as evidence, for the purpose of pointing out and showing to what the said agreement in suit applied and had reference.

The defendant objected to all this testimony, and contended that the agreement declared on was insufficient in law to bind him; that it could not be ascertained from the agreement itself what property was to be sold and conveyed; that it was void for uncertainty; that it did not comply with the requisitions of the statute of frauds; and that parol evidence could not be received for any of the purposes for which it was offered.

The judge reserved the questions arising on the agreement, and on the evidence offered by the plaintiffs, for the consideration of the whole court.

*J. G. Abbott*, for the plaintiffs. The memorandum of the agreement is sufficient of itself, and could not be mistaken by one standing in the situation in which the parties stood at the time, or knowing what building, owned or held in any way by the defendant, answered to the description and requirements of the memorandum. Although this agreement may in some respects appear uncertain, it points out the evidence which will make it certain. Browne on St. of Frauds, §§ 383, 385, 409 *a*. *Howe* v. *Dewing*, 2 Gray, 476. *Atwood* v. *Cobb*, 16 Pick. 229. The parol evidence was competent and sufficient for the purposes for which it was offered. See authorities before cited.

*G. A. Somerby*, for the defendant.

Gray, J. The memorandum required by the statute of frauds to maintain an action on a contract for the sale of any interest in land must clearly show, either by itself, or taken in connection with some other writing contemporaneous with or referred to in the memorandum, what that interest is. The court may indeed, for the purpose of interpreting the memorandum, put itself in the position of the parties, and ascertain by oral evidence their relations to any property which would satisfy the terms of the memorandum; but, seen in the light of these circumstances, the

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writing, whether consisting of one paper or several, must describe or identify the subject of the contract.

The memorandum on which the plaintiffs rely describes the thing to be bought and sold as "the whole property, from cellar to top, including lease, press, boiler and engine, type, fixtures, furniture," &c. If it is allowable (of which there is some doubt) for the court to refer, when the memorandum does not, to the instrument of lease to the defendant, in order to supply the duration of the lease mentioned in the memorandum, the difficulty still remains that the memorandum is not limited to property owned or held by the defendant, and the words used are certainly not less applicable to the whole estate than to a leasehold interest in it. It is "the whole property, from cellar to top," not "your property" or "your interest in the property," which is to be bought and sold. It is not described as "consisting of," but as "including," the lease, printing press, fixtures and furniture. The agreement of Pratt with the defendant, as stated in the plaintiffs' offer of evidence, was "for a release and conveyance of a small portion of the land included in said lease;" but even if Pratt's agreement was confined to a leasehold interest, it does not follow that the property which the defendant agreed to sell to the plaintiff was no greater estate. The stipulations as to payment of "ground rent" are not expressed with such definiteness as to clear up the ambiguity of the principal words of description. To hold such a memorandum, which does not show whether it relates to an estate in fee, for life or for years, sufficient to take the case out of the statute of frauds, would be to practically do away with the statute, and to disregard precedents of the highest authority. *Fitzmaurice* v. *Bayley*, 9 H. L. Cas. 78; *S. C.* 8 El. & Bl. 664. *Clinan* v. *Cooke*, 1 Sch. & Lef. 22. *Abeel* v. *Radcliff*, 13 Johns. 297. *Morton* v. *Dean*, 13 Met. 385. *Waterman* v. *Meigs*, 4 Cush. 497.

*Judgment for the defendant.*

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## Seth Whittier & another *vs.* James Dana & another.

*If the time for the performance of a written contract, which is within the statute of frauds, has been extended by parol, an action can only be maintained upon the written contract; and it is no defence to such action to prove that the time for the performance has been extended by parol, if the defendant has not performed or offered to perform it within the time as extended; and the damages in such case are to be fixed with reference to the time when the written contract was broken.*

Contract upon a written agreement dated October 9th 1863, by which the defendants agreed to sell to the plaintiffs two hundred thousand of Brewer bricks, more or less, at eight dollars and twenty-five cents a thousand, cash on delivery, to be delivered any time before December 20th. The declaration alleged that the plaintiffs demanded the delivery of the bricks according to the contract, and were ready and offered to pay for the same; but, the defendants being unable then to deliver them, it was specially agreed between the parties that the time for the delivery should be extended, and it was extended from time to time by special agreement down to the time of suing out this writ, when the defendants refused to deliver the bricks.

The defendants in their answer denied each and every allegation of the declaration.

At the trial in the superior court, before *Russell*, J., before any testimony was offered, the defendants objected that the action could not be maintained; but the objection was overruled.

The plaintiffs then proved the written contract, and introduced evidence tending to show an oral extension of the time of delivery till the opening of river navigation in the spring; whereupon the defendants requested the court to rule that the plaintiffs had failed to maintain their action; but this was refused.

Certain evidence was introduced and offered as to the value of Brewer bricks and other bricks in the spring of 1864, the time when the defendants finally refused to deliver said bricks; and questions arose concerning the same, which are now immaterial.

The defendants requested the court to instruct the jury, amongst other things, as follows: 1. Unless the jury are satisfied

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upon the evidence that there was an agreement for an extension of the time of delivery of the bricks and of payment therefor, the plaintiffs cannot maintain this action. 2. If the jury shall find that there was a parol agreement for an extension of the written contract, the plaintiffs cannot recover upon such parol agreement upon their declaration, because the same is not in writing. The judge gave the first instruction as requested, and declined to give the second.

The jury returned a verdict for the plaintiffs, and the defendants alleged exceptions.

*H. C. Hutchins*, for the defendants.

*O. Stevens*, for the plaintiffs.

Hoar, J. The principal question in this case is governed by the decisions of this court in *Cummings* v. *Arnold*, 3 Met. 486, and *Stearns* v. *Hall*, 9 Cush. 31; in both of which the doctrine was recognized and affirmed, that where a written contract within the statute of frauds has been varied by a subsequent parol agreement, affecting the mode of performance only, the action can be maintained only upon the written contract; because to allow a party to sue partly on a written and partly on an oral agreement would be in direct contravention of the statute. But it was further held in *Cummings* v. *Arnold* that, in defence to an action on the written contract, the defendant may show that he has performed it according to an oral agreement for a substituted performance, or, being ready to do so, was prevented by the act of the plaintiff. And in *Stearns* v. *Hall* a plaintiff who declared upon the original contract in writing was allowed to prove, in answer to the defence that he had not performed the contract according to its terms, that a different performance had been agreed to be substituted by parol, and that he had performed or had been ready to perform the substituted agreement. The whole doctrine is well stated, and the authorities collected and reviewed, in Browne on St. of Frauds, (2d ed.) §§ 409–428.

The plaintiffs might therefore maintain this action upon a declaration framed upon the written contract, and the substituted performance agreed on would not avail the defendants, as

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they have not done, or offered to do, what it required. *Lerned* v *Wannemacher*, 9 Allen, 412.

On examining the declaration, it appears that the written contract is set forth, and a substantial breach of it; but the plaintiffs go further, and allege the extension of the contract time by agreement of the parties, and a breach of the new agreement. Whether the new agreement was in writing is not averred, but the evidence showed it to have been made by parol.

It may be questionable whether there was anything erroneous or fatally defective in the declaration. It set forth a good cause of action, and conformed to the truth of the case. The plaintiffs could not know that the defendants would rely upon the statute of frauds. When they did rely on it, the declaration could have been amended by striking out the latter averments, if an amendment was necessary. But the ruling that the plaintiffs could not recover upon the declaration without proof that there was an agreement for an extension of the time of performance was made at the request of the defendants, and is not excepted to; and we allude to it only because it may be material upon a new trial.

The defendants then asked for the instruction "that if the jury should find that there was a parol agreement for an extension of the written contract, the plaintiffs could not recover upon such parol agreement, because the same is not in writing." This instruction, which was refused by the court, ought to have been given; and upon this point the exceptions are sustained, and a new trial granted.

This ruling shows the other exceptions to be immaterial. The evidence as to damages related to the price of the brick at the time of the defendants' final refusal to deliver them in the spring which was not the true subject of inquiry. The question should have been as to the damages sustained at the time the written contract was broken. So it is unnecessary to decide whether the parol agreement was shown to be an extension of the time of delivery to the opening of navigation, or until the date of the writ. *Exceptions sustained.*

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THOMAS M. BREWER *vs.* ROLAND WORTHINGTON & others.

If upon the dissolution of a firm the partners who remain assume the payment of the partnership debts and agree to save the retiring partner harmless therefrom, and a judgment is subsequently recovered against all of them upon one of the partnership debts, and the retiring partner pays a portion of the amount to the judgment creditors, taking from them an agreement in which they, in consideration of the payment to them, covenant not to molest him or take his property thereon, reserving all their rights against all the other judgment debtors, he may recover the amount so paid by him in an action against his former partners.

CONTRACT upon a written agreement by the defendants, reciting that the plaintiff retired from the firm of Worthington, Flanders & Guild, of which he and the defendants had been members, conveying to them all his interest in all the property of the partnership, and providing that they should assume and pay all the debts and liabilities, and save the plaintiff harmless therefrom.

At the trial in the superior court, before *Morton*, J., it appeared that two judgments upon two notes amounting together to about $9000, were subsequently recovered by the Telegraph Newspaper Company against the plaintiff and the defendants upon debts of the firm, and afterwards the plaintiff paid to the judgment creditors the sum of $1000, partly in cash and partly in a note of a third person, taking from them an agreement reciting that, in consideration of the said payment to them by the plaintiff, they covenanted and agreed never to "molest or arrest the said Thomas M. Brewer, or his legal representatives, or attach or seize or levy upon his or their property upon or on account of either of the judgments," "hereby reserving all our rights against all the other judgment debtors." Due demand was made by the plaintiff upon the defendants.

Upon these facts the judge directed a verdict for the plaintiff, for the $1000 and interest, which was rendered accordingly; and the defendants alleged exceptions.

*G. O. Shattuck*, for the defendants.

*B F. Brooks*, for the plaintiff.

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DEWEY, J. This contract is something more than a mere contract of indemnity. It is also an agreement to assume and pay all the debts and liabilities of the late firm of Worthington, Flanders & Guild. Two notes given to the Telegraph Newspaper Company afterwards fell due which the defendants neglected to pay, and permitted suits to be instituted thereon, and judgment to be rendered against the plaintiff and themselves. In this state of the case, the plaintiff, being subject to a levy of the execution upon this judgment, made the arrangement with the creditors in the manner stated in the bill of exceptions.

There was clearly a breach of the covenant of the defendants for which the plaintiff may maintain his action, and the only inquiry is as to the measure of damages. If treated as a mere bond of indemnity, the plaintiff could only recover nominal damages, if he had made no payment thereon and had suffered no particular damage.

In the case of a covenant to pay the sole debt of the obligee to a third person, we see no objection to the obligee's recovering the whole amount of the debt which the defendant had stipulated to pay, in case of a breach of the covenant, as such recovery fully discharges the obligor from all further liability. But where the covenant is to pay a debt due to a third person as well from the obligor as the obligee, a difficulty arises, inasmuch as the defendant may be further charged with the debt by those to whom it is payable.

It may be thought that the case of *Loosemore* v. *Radford*, 9 M. & W. 657, is somewhat more favorable to the plaintiff, and would authorize a recovery for the whole amount without any previous payment thereof by him. It was a covenant to indemnify against a note where both parties to the covenant were promisors in the note, the plaintiff in fact being a surety for the other party, and the defendant covenanted with the plaintiff to pay the note to the payee on a future day named, but neglected so to do; and it was held that the plaintiff was entitled to recover as damages the full amount of the note, although he had not paid the same. It was said on that case by Parke, B. "that the defendant may perhaps have an equity that the money

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he may pay to the plaintiff shall be applied in discharge of his debts, but at law the plaintiff is entitled to be placed in the same situation under this agreement as if he had paid the money to the payee of the bill."

But it seems to be unnecessary to express an opinion upon the question presented in a case where there has been no payment. Here the plaintiff makes no claim beyond the one thousand dollars paid by him, and the precise inquiry is whether that sum was paid under such circumstances as to create a valid claim for damages to that extent. That the plaintiff had the right to pay the judgment, and resort to the defendants for remuneration, cannot be doubted; but the theory of the defendants is, that this sum of one thousand dollars was not paid upon the judgment, or in discharge of any portion thereof, and that they remain liable to the judgment creditors for the full amount of the same, and thus will be liable to be twice charged, if the plaintiff is allowed to recover damages for the payment made by him. But we do not consider the plaintiff's claim obnoxious to that objection. We must suppose that the payment was made upon the judgment, and that the purpose of the parties was to fix a certain amount which, if paid, should operate to bind the creditors not to levy their executions upon the body or property of the plaintiff. But it is not to be inferred that it was the purpose of this arrangement that the judgment creditors were in any event to receive more than the whole amount of the judgments. The practical effect of the arrangement was that the creditors received one thousand dollars upon the judgment from the plaintiff, and thereupon obligated themselves to collect the residue wholly from his co-debtors. The facts, therefore, show not only a breach of the covenant of the defendants to pay this debt, but also a case of actual damage to the amount of the sum paid by the plaintiff, for which he is entitled to recover.

*Exceptions overruled.*

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## Edward Harper *vs.* Samuel J. Ross.

A formal bill of sale, absolute in its terms and under seal, conveying personal property with covenants of warranty, cannot, in an action at law between the parties to it, be shown by parol evidence to have been intended only as collateral security.

Replevin of books. At the trial in the superior court, before *Morton*, J., without a jury, the plaintiff put in evidence a formal bill of sale from the defendant to him, absolute in its terms, and under seal, conveying the books with covenants of warranty. The identity of the books was admitted, but the defendant offered to prove by parol evidence that the bill of sale was given merely as collateral security for a note given by the defendant to the plaintiff to indemnify him for becoming surety for a third person at the defendant's request, upon an appeal, and that it was agreed that as soon as the plaintiff should be discharged from liability as surety he should deliver up the note and bill of sale; and that the plaintiff had been discharged from said liability. The judge rejected the evidence, and found for the plaintiff. The defendant alleged exceptions.

*S. J. Ross*, *pro se*.

*A. Russ*, for the plaintiff.

Chapman, J. The plaintiff derives his title to the books in question from a formal bill of sale signed and sealed by the defendant, and absolute in its terms. The defendant offered parol evidence to prove that the sale was not intended to be absolute, but that the bill was given as collateral security to the plaintiff for becoming surety for a third person, at the defendant's request, upon an appeal; and that the defendant had been discharged from his liability. He excepts to the ruling of the judge excluding the evidence.

If the writing had been a mere bill of parcels, the evidence might have been admissible. *Hazard* v. *Loring*, 10 Cush. 267 *Hildreth* v. *O'Brien*, *ante*, 104. The rule that parol evidence is inadmissible to vary or control a written contract is held to be inapplicable to such a paper, because a bill of parcels is an

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informal document, and not used or designed to set out the terms and conditions of a contract of bargain and sale. But the rule is clearly applicable to such a bill of sale as the one produced in this case, and is uniformly adhered to in actions at law.

*Exceptions overruled.*

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PETER HUBBELL *vs.* MARY JANE CURRIER & others.

If land has been conveyed by an insolvent debtor in fraud of creditors to one who has thereafter mortgaged it to a third person by a mortgage which is also void, the assignee of the insolvent debtor may maintain a bill in equity to set aside the conveyances. If, however, the mortgage has been assigned to an innocent purchaser for a valuable consideration, it cannot be declared void, but the parties to the fraud will be held responsible for the amount thereof.

BILL IN EQUITY brought by the assignee of Lewis Currier, an insolvent debtor, alleging that a warrant in insolvency was duly issued against the estate of said Lewis on the 16th of February 1863, and the plaintiff was duly chosen assignee of his estate; that on the 13th of May 1861 said Lewis, being seised of two certain parcels of land in Boston, conveyed the same to Richard F. Fuller, who on the same day conveyed the same to Mary Jane Currier, wife of said Lewis; that both of these conveyances were voluntary and without any valuable consideration, and that the conveyance to Fuller was merely in order that he might convey the lands to Mrs. Currier; that said Lewis was then largely indebted, and made said conveyance for the purpose of defrauding his existing and subsequent creditors; that on the 12th of September 1862 said Mary Jane Currier and Lewis Currier mortgaged the said parcels of land to Samuel Q. Currier, a brother of said Lewis, to secure the sum of four thousand dollars, and that said mortgage was also without consideration and fraudulent, as against the creditors of Lewis Currier; that in and during the year 1862 said Lewis entered into contracts with sundry persons on credit by means of which he built upon one of said parcels a brick dwelling-house, with

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the intention of not paying the debts so contracted; that on the 3d of January 1863 Samuel Q. Currier assigned said mortgage to Andrew G. Greely, without consideration, and that said assignment was made and received in fraud of the creditors of said Lewis. The prayer was that the deed, mortgage and assignment might be declared void, and the premises released to the plaintiff.

The defendants filed a general demurrer, and the case was reserved by *Chapman*, J. for the determination of the whole court, and argued in March 1864.

*H. W. Paine & R. D. Smith*, for S. Q. Currier and A. G. Greely.

*J. B. Richardson*, for Lewis Currier and Mary Jane Currier.

*H. G. Hutchins*, for the plaintiff, was not called upon.

Bigelow, C. J. This case differs from any which have heretofore been determined by this court, in which it has been held that an assignee in insolvency cannot maintain a bill in equity to recover land which had been conveyed in fraud of the creditors of the grantor. In the cases in which it has been so decided, it was apparent that a single writ of entry in favor of the assignee would settle the whole title in controversy, and leave no question open between the assignee and other parties to be determined by another suit. An action at law was therefore an adequate and complete remedy. *Thayer* v. *Smith*, 9 Met. 469. *Woodman* v. *Saltonstall*, 7 Cush. 181. *Pratt* v. *Pond*, 5 Allen, 59. Not so here. The title by which the grantee of the insolvent debtor claims to hold the estate is distinct from that of the mortgagee. A recovery against the former in a writ of entry would still leave the title of the latter undetermined. The validity of the two titles would depend in part on different facts, and the application of different legal principles. It would seem, therefore, to be a case where an assignee in insolvency is seeking to recover certain parcels of real estate in which two persons claim to have distinct rights and interests, which cannot be definitively determined in one action at law.

It has been suggested that the grantee of the insolvent debtor and the mortgagee to whom she conveyed the premises in

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mortgage might both be joined in a writ of entry, and their respective titles to the property tried and determined in one and the same action. This course of practice is certainly not conformable to the general rule of law in real actions, which is, that two persons cannot be joined in a real action who claim to hold an estate by distinct and separate seisins. As their titles are different, and they may have different grounds of defence, the causes of action are distinct, and cannot be joined in one writ. Hence it is that, where two or more persons are joined in a real action, they are always supposed to have the same title and seisin, and to be either joint tenants, or coparceners of the land demanded. Jackson on Real Actions, 72. *Varnum* v. *Abbot*, 12 Mass. 474, 480.

But it is urged that this principle does not apply where the persons sued are mortgagor and mortgagee of the same parcel, and a passage from Jackson on Real Actions, 88, *et seq.*, is cited in support of this suggestion. It is undoubtedly true, as there stated, that a mortgagor and mortgagee may be sued in the same action. But this exception to the general rule was allowed only for the purpose of preventing an abatement of the writ by the entry of the mortgagor or mortgagee after action brought in pursuance of the condition in the mortgage, and thereby defeating the estate of the tenant in the action, and affording sufficient ground for an abatement of the writ. Thus, if a mortgagee was sued in a real action, the mortgagor, by paying the money on the day specified in the condition, might revest his estate and enter on the mortgagee; or the mortgagee, if the condition of the mortgage should be broken pending an action against the mortgagor for recovery of the premises by a third person, might enter for such breach and expel the mortgagor; in either of which cases such entry might be pleaded in abatement of the writ by the tenant in the action. But the respective titles of both mortgagor and mortgagee to the demanded premises could not be tried in such action. This is manifest from the course which the pleadings would take, as stated by Judge Jackson. If both mortgagor and mortgagee, when sued jointly, should each by his plea seek to abate the writ by taking on himself the

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entire tenancy, the demandant would reply the special matter, setting forth the existence of the mortgage and averring that at the time of action brought the mortgagor or mortgagee (as the case might be) had not entered on the demanded premises. If this replication was supported and the tenants required to answer over, then, if the mortgagee should plead that he had nothing but an estate on condition, and that the mortgagor had since the commencement of the action entered, and if the mortgagor should answer as sole tenant, the demandant might accept the latter as tenant to his writ, and reply to his bar as if he had been impleaded alone. So if the mortgagor had not entered, and should plead that he had nothing but a right of entry on condition, and the mortgagee should take the entire tenancy and plead over, the demandant would accept the latter as tenant, and reply to his bar. But in either case the title of the one only who had been accepted as tenant could be tried in the action; the plea of the other who had not taken on himself the sole tenancy being regarded as equivalent to a plea of non-tenure or disclaimer. By no form of pleading recognized by the rules of law could they both put in issue their respective titles, so that they could be adjudicated in the same action.

Inasmuch as the bill in the present case sets forth facts which make a case of fraud of a nature which constitutes a proper subject matter of jurisdiction in equity, and the remedy at law for the grievances alleged in the bill is not adequate and complete, we are of opinion that the order must be

*Demurrer overruled.*

After the above decision had been made, the defendants filed answers, and evidence was taken before a master upon the issues of fraud which were raised, and the case was reserved upon the merits for the determination of the whole court, and argued in March 1865, by *H. G. Hutchins*, for the plaintiff, and *R. D Smith*, for the defendants; and the court found that the convey ance through Fuller to Mary Jane Currier was made with an intent to defraud creditors of Lewis Currier, of which she had notice and knowledge; and that the mortgage to Samuel Q.

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Currier was made with like intent, and that said Samuel Q. had notice of such intent. The mortgage was therefore adjudged void as against him; but as he had transferred the same to Greely, without notice of the fraud and for a valuable consideration, it was also adjudged that the mortgage could not be avoided, and that the parties to the fraud were therefore responsible for the amount of the mortgage; and a decree was entered for the plaintiff against Mary Jane Currier and Lewis Currier for a conveyance to the plaintiff of the premises subject to the mortgage; and against Mary Jane Currier, Lewis Currier and Samuel Q. Currier for the amount due on the mortgage, to be ascertained by a master, unless agreed upon, with costs; and for the defendant Greely, with costs.

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## Charles M. Barrett *vs.* Samuel O. Mead.

Proof that a company has attempted to form an organization under the statutes of another state, and has transacted business as a corporation *de facto*, and that its certificates of shares contain a recital that it was organized under the general laws of that state, is sufficient, in the absence of anything to control it, to authorize a jury to find that the company was duly incorporated, in a case in which the fact is only collaterally in issue.

A written contract for the transfer of shares in the capital stock of a company incorporated under the statutes of another state is void, under Gen. Sts. *c.* 105, § 6, unless the contracting party is, at the time of making the contract, the owner or assignee thereof, or authorized to sell or transfer the same. And it is immaterial that such contracting party had, as a broker, previously sold the same number of shares of the same corporation in violation of his instructions, and that he entered into the contract for the purpose of indemnifying the owner.

Contract. The declaration contained several different counts, which were averred to be for the same cause of action. One count alleged a failure to fulfil the following agreement: "Boston, April 22, 1862. On demand I agree to deliver unto Charles M. Barrett forty shares of the Petherick Mining Company stock upon the payment of sixty dollars. Saml. O. Mead." Another count set forth that the defendant, being indebted to the plaintiff for certain stock of the Petherick Mining Company, agreed to



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pay him therefor in cash the sum of eight hundred dollars, which sum is now due to the plaintiff.

The answer, amongst other things, admitted that the defendant signed the agreement declared on, but averred that it was given without consideration; that he did not then own and had not the right to sell any shares of said stock, and that the agreement was illegal and void; and denied having agreed to pay the plaintiff eight hundred dollars, and averred that, if he did make such agreement, it was without consideration and void.

At the trial in the superior court, before *Ames*, J., the plaintiff testified that in the summer of 1861 he put one hundred shares of the stock of the Petherick Mining Company into the hands of the defendant, who was a stock broker, for sale, at the limited price of one dollar and a half per share; that the defendant accordingly sold sixty at that rate, whereupon the plaintiff directed him not to sell the rest; that soon after the defendant told the plaintiff that he had sold the other forty shares by mistake, but promised to give him forty shares at any time; that the defendant then paid the plaintiff for the sixty shares, and afterwards, on the 22d of April 1862 paid the further sum of sixty dollars, and executed the agreement declared on; that the shares subsequently rose in value, and in August 1863 the defendant promised to pay for them at the rate of twenty dollars a share, but afterwards refused to do so, or to deliver the shares.

The defendant denied some of the above statements, and introduced, under objection, certain evidence, which is sufficiently set forth in the opinion, to show that the Petherick Mining Company was a corporation duly organized under the general laws of Michigan; and he testified that at the date of the written agreement he was not the owner, nor the assignee or agent of any owner, of any shares in the capital stock of that company.

The judge ruled that upon this evidence the plaintiff was not entitled to maintain his action, and a verdict was accordingly returned for the defendant. The plaintiff alleged exceptions.

*W. Brigham*, for the plaintiff, cited *Thompson* v. *Alger*, 12 Met. 428.

*S. W. Bates*, for the defendant.

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Hoar, J. The first question presented by the bill of exceptions is, whether the evidence was sufficient to show that the Petherick Mining Company was a company incorporated under a law of the State of Michigan.

The general statute of that state, providing for the incorporation of such companies, was proved by the production of the printed volume of laws, purporting to be published under the authority of the state government; which is *prima facie* evidence. Gen. Sts. *c.* 131, § 63. The proof that the company had attempted an organization under this statute, and had transacted business as a corporation *de facto* under that organization, was ample. The certificates of shares of stock in the company, delivered by the plaintiff to the defendant, recited that the company was "organized under the general laws of Michigan." This constituted sufficient evidence, in the absence of anything to control it, to authorize the finding that the company was duly incorporated, in a case in which the fact was only collaterally in issue.

The defendant was then sued upon a contract for the transfer or sale of shares in the stock of a company incorporated under the laws of one of the United States, and he was not, at the time of making the contract, the owner or assignee of the stock nor authorized by the owner or assignee, or his agent, to make the sale or transfer. Such a contract is void in law, and will not support an action. Gen. Sts. *c.* 105, § 6. The language of the statute is express and absolute, and admits of no exception derived from the purpose or consideration for which the contract is made. *Exceptions overruled.*

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## George O. Blake & another *vs.* Maria L. Sawin.

Assignees of an insolvent debtor may maintain a real action against his wife, without averring that she held the land to her sole and separate use.

A party who in the course of a trial has admitted the execution of a deed cannot afterwards in the same trial require it to be proved by calling the attesting witnesses.

A declaration in a real action which alleges that a married woman disseised the demandant is not contradicted by proof of fraudulent conveyances to her, to her sole and separate use.

If a copy of a paper has been admitted as secondary evidence, and the original is subsequently found, it is within the discretion of the court to permit the original to be put in evidence, after the opening of the case of the adverse party.

A debtor who has concealed his property in order to defraud his creditors is to be regarded as insolvent, although he may have sufficient property in money to pay all his debts.

Evidence that the business of an insolvent debtor was the sale of intoxicating liquors at retail, and that the notes which he owed were all given to pay for such liquors, is not sufficient to prove that the consideration of them was illegal, or to call for a ruling in regard to the effect which would be produced upon an action brought by his assignees to set aside a conveyance by him as fraudulent, if the consideration were illegal.

It is not necessary to make a formal ruling to the jury that in a writ of entry the rights of the parties are to be determined upon strict principles of law, although the tenant asks for such ruling; but it is sufficient to rule that the case is to be tried upon the law and the evidence, like all other cases.

A voluntary conveyance made by an insolvent debtor for the purpose of defrauding his creditors may be avoided by his assignees, although the grantee did not participate in the fraudulent intent.

Writ of entry, dated December 21st 1863, by the assignees of George H. Sawin, an insolvent debtor, against his wife, to recover a house and land on Temple Street in Boston. The declaration was in the ordinary form, and did not allege that the tenant held the land to her sole and separate use; and the writ described her as the wife of George H. Sawin.

At the trial in the superior court, before *Ames*, J., the tenant asked the court to rule that the action could not be maintained upon the declaration; but the judge refused so to rule.

In order to prevent a delay for the purpose of procuring the attendance of the subscribing witnesses to a deed of the premises to George H. Sawin, which the tenant had previously agreed to produce at the trial, the tenant admitted the execution of it, but asked the court to rule that nevertheless the demandants must call the attesting witnesses; but the judge ruled otherwise.

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The demandants put in evidence a deed of the premises from George H. Sawin to George Sennott, and a deed from the latter to the tenant, to her sole and separate use; both being for the expressed consideration of one dollar and other good and valuable considerations, and bearing date November 11th 1862, acknowledged, executed and recorded together. The tenant objected that these deeds proved a fatal variance from the declaration, but the judge ruled otherwise.

The demandants then proved that proceedings in insolvency against Sawin were commenced in April 1863, and, the original assignment to them being lost, a certified copy was put in evidence. After the tenant's case had been opened, the original was found, and admitted in place of the copy, against the tenant's objection.

The demandants offered evidence tending to prove that Sawin purchased a large amount of merchandise in September and October 1862, and in November converted it into money, amounting to about $35,000, and carried the money to California, informing no one of his intention but his wife and Mr. Sennott, his counsel, and making no provision for his debts; that his business was the sale of intoxicating liquors at retail, and that the notes which he owed were all given to pay for such liquors. There was no evidence whether or not the sellers had licenses. The judge ruled that the alleged illegality of consideration was not open to the tenant in this action.

The tenant requested the court to rule that in a writ of entry the rights of parties are to be determined upon strict principles of law. The judge, instead of so ruling, instructed the jury that the burden of proof was on the demandants, who could only prevail on the strength of their own title; that this case was to be tried upon the law and the evidence, like any and all other cases, and that in this respect there was no difference between this case and any other.

It was in evidence, and not denied, that on the 11th of November 1862 George H. Sawin was in good credit, had the house now in controversy, $25,000 in money, and no notes payable until December. It was in dispute whether his conveyance

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of that date was voluntary or for a valuable consideration. The tenant asked the court to rule that a man is said to be insolvent who is under a present inability, in the ordinary course of business, to answer the responsibility which his creditors may enforce by legal proceedings, and that even if any creditor of Sawin could then have enforced anything legally against him, Sawin was not then under any present inability to pay; and that, to be insolvent when the conveyance was made, Sawin must be shown to be overwhelmed with debt without means, after making the conveyance, to pay existing debts.

The judge did not rule in the words prayed for, but instructed the jury that if they found that the tenant did not pay any money or give any valuable consideration for the property, and if Sawin in making the conveyance had and carried out a fraudulent intent against creditors, the demandants would be entitled to recover; that in that event it would not be necessary to show that the tenant participated in or knew such intent on his part; that it was not necessary to show actual insolvency on his part, but it was enough to show that he was heavily and largely indebted; that he wanted to put the property out of the reach of his creditors, and that the demanded premises would probably be needed for their payment; that he might be considered as insolvent, for the purposes of this trial, if he were fraudulently concealing his property to avoid the payment of his debts, and to prevent its being taken by his creditors, thereby rendering himself liable to be proceeded against as an insolvent debtor, even though his property should consist of money in his pocket, and should be sufficient to pay all his debts; that a man may be said to act in contemplation of insolvency, who takes a course which he knows, or would naturally expect, would cause his creditors to proceed against him as an insolvent debtor; and that if the jury thought he intended to defraud creditors, they were to consider and satisfy themselves, on the evidence, when that purpose was formed, and whether the conveyance to his wife was with the same intent and a part of the same scheme and whether at that time he intended to withdraw himself and his property from the reach of his creditors.

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The jury returned a verdict for the demandants, and the tenant alleged exceptions.

*G. Sennott*, for the tenant.

*R. M. Morse, Jr.*, for the demandants.

CHAPMAN, J. 1. The tenant contends that assignees in insolvency cannot maintain a real action against one whom they aver to be the wife of their insolvent, without also averring her statute qualifications to hold real property. It is not denied that she may hold such property, and sue and be sued in respect to it according to the provisions of Gen. Sts. *c.* 108, §§ 1, 3. But we see no necessity for such an averment as is suggested. The ordinary form of a count in a writ of entry is adapted to the case, and there is no rule of pleading or statute provision that renders any special averments necessary.

2. After the tenant had admitted the execution of the deed from Poole to Sawin, it was not necessary for the demandants to offer proof of its execution. The effect of an admission is to avoid the necessity of proving the fact admitted; and the fact that the admission was made to prevent the demandants from obtaining a postponement of the case does not alter its effect in this respect.

3. There was no variance between the declaration and the evidence. The deeds were offered for the purpose of proving that the tenant had a title to the land by a voluntary conveyance which was not valid as against the demandants, though it might be valid as between the parties. It was pertinent evidence.

4. It was within the discretion of the presiding judge to allow the demandants to put in the deed of assignment to them after the tenant's defence was opened, and no exception lies to such a decision. As a matter of practice, this is too well settled to require the citation of authorities.

5. The evidence tending to show that Sawin concealed his property for the purpose of defrauding his creditors was competent, and it was not necessary to prove his actual inability to pay his debts. *Bartholomew* v. *McKinstry*, 6 Allen, 567.

6. The ruling as to the alleged illegality of the consideration

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of Sawin's notes was not material. The only facts on the subject which appear in the report are, that Sawin's business was the sale of intoxicating liquors at retail, and that the notes which he owed were all given for the purchase of the liquors which he thus sold, and for no other consideration. This alone does not make the consideration illegal.

7. It was not necessary for the court to make a formal ruling that the rights of the parties were to be determined upon strict principles of law. The ruling actually made was more pertinent to the case, and instructed the jury sufficiently.

8. The instructions as to what would constitute insolvency were correct and full. *Exceptions overruled.*

HOWARD SNELLING *vs.* JOHN P. COBURN.

After a judgment debtor, who has been arrested on an execution, has applied to a proper magistrate to have a time and place fixed for his examination as a poor debtor, and a time and place have been fixed accordingly and notice thereof given to the creditor, under Gen. Sts. c. 124, § 12, another magistrate has no jurisdiction, unless the former application is withdrawn, to take a recognizance under § 10, that he will deliver himself up for examination within thirty days; and a recognizance so taken is void.

CONTRACT against a surety in a recognizance, the condition of which provided that the judgment debtor, who had been arrested on an execution in favor of the plaintiff, should within thirty days deliver himself up for examination, giving notice of the time and place thereof, and duly appear, making no default, and abide the final order of the magistrate thereon.

It was agreed in the superior court that on the 16th of July 1864 an officer arrested Andrew Crockett on an execution in favor of the plaintiff, and took him before J. B. Richardson, a commissioner of insolvency, who, upon Crockett's request, fixed a time and place for his examination as a poor debtor, to wit, the afternoon of the same day, and issued notice thereof to the plaintiff, which was duly served. After the service of this notice, and before the time fixed for the examination, Crockett was taken

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before C. C. Nutter, a master in chancery, and entered into the recognizance declared on, with the defendant as his surety. No proceedings were had under this recognizance, but Crockett appeared before the commissioner of insolvency at the time and place fixed for his examination, but the plaintiff did not appear; and the hearing was adjourned for two days, when Crockett was discharged.

Upon these facts, judgment was rendered for the defendant; and the plaintiff appealed to this court.

*L. M. Child*, for the plaintiff.

*T. F. Nutter*, for the defendant.

Dewey, J. The recognizance relied upon to sustain this action is invalid, having been taken after the principal, who was under arrest on an execution, had applied to a commissioner of insolvency, desiring to take the oath for the relief of poor debtors, and to have a time fixed for immediate examination, and the commissioner had appointed such time and place for said purpose, and due notice thereof had been issued and served upon the creditor. Pending these proceedings, and without any formal withdrawal of the application, or any notice to that effect given to the creditor, the debtor applied to another magistrate to take from him a recognizance that within thirty days from the time of his arrest he would deliver himself up for examination before some magistrate authorized to act, giving notice of the time and place thereof in the manner provided by law; and this recognizance was then taken.

This proceeding was irregular, as the debtor had already elected which of the two modes provided in the statute for his relief he would adopt. The jurisdiction had attached to the magistrate who had, at the request of the debtor, issued the notice to the creditor. The time and place appointed by him were the time and place for the examination, and both parties were to govern themselves accordingly.

The only question would seem to be, whether this defence is open to the defendant. It is urged on behalf of the plaintiff that the debtor and his surety, having entered into this obligation, cannot now ignore it. But we think the defence of a want

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of jurisdiction may be properly made in avoidance of a recognizance taken under circumstances like the present.

*Judgment for the defendant.*

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GEORGE H. RANDALL *vs.* TRUMAN G. BANCROFT & another.

If, on a petition for review of a judgment, a bond is given providing that the petitioner "shall forthwith prosecute a review of said action to final judgment, and satisfy such execution as may be issued against him on the review," and no writ of review is granted, but the petition is dismissed, there is a breach of the condition of the bond.

CHAPMAN, J. This was an action of contract to recover damages for a breach of the condition of a bond given by the defendants on a petition for review of a judgment. It appears that the plaintiff recovered a judgment against the defendant Bancroft, and an execution was issued and placed in the hands of an officer, by whom Bancroft was arrested. After his arrest he filed a petition for a review of the action, and prayed for a stay or supersedeas of the execution. Proceedings in review are regulated by Gen. Sts. *c.* 146, §§ 19–38. By § 38 it is provided that "after the rendition of judgment in a civil action, if the execution has not been satisfied, the court or justice, upon the petition of the defendant, may order a stay or supersedeas of it, if the petitioner gives to the adverse party security to the satisfaction of the court or justice, with condition that he will forthwith prosecute a writ of review to final judgment, and satisfy such execution as may be issued against him on the review. The execution shall not otherwise be stayed or superseded by the writ of review." Bancroft gave a bond which the other defendant, Butterfield, executed as his surety, and its condition was in conformity with the words of the statute. It is as follows: "Now if the said Bancroft shall forthwith prosecute a review of said action to final judgment, and satisfy such execution as may be issued against him on the review, then this bond shall be void; otherwise, the same shall remain in full force." Upon a hearing of the parties on the petition for review

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the petition was dismissed, and of course the writ was not prosecuted. It is now contended that the condition of the bond is not broken, on the alleged ground that the dismissal of the petition is not a case contemplated by the bond or by the statute. It is said that the statute is defective in this respect, and that the bond is also defective.

But if the condition of the bond is to be construed literally, it has been broken, for the petitioner has failed "to prosecute a review of the action to final judgment." The spirit and intent of the statute are also in conformity with this construction. Where a party is not absolutely entitled of right to a review, his right to it is dependent upon the discretion of the court. But this discretion is guided by general principles and rules, and the party knows when he files his petition that he must establish a case entitling him to a writ of review according to these principles and rules. By a stay or supersedeas of execution, his property becomes exempt from levy and his body from arrest, and if property has been attached on mesne process the effect is usually to discharge the attachment, because the process is usually kept pending till after thirty days from the time of judgment have elapsed.

It is but reasonable, therefore, that he should give such a bond as will throw upon him the risk of being able to establish such a case by evidence as will induce the court to grant him a writ of review. If he is not able to establish such a case, the fault is his own, and it would be unjust to the plaintiff to release the defendant from his bond on that ground. The statute evidently intends to put the risk upon him, and prescribes a condition accordingly.

The 38th section of the statute differs from Rev. Sts. *c.* 99, § 22. The change was evidently made in consequence of the opinions and suggestions expressed in *Lehan* v. *Good*, 8 Cush. 302, and *Gifford* v. *Whalon*, Ib. 425; and the propriety of the change is made further apparent by the case of *Green* v. *French*, 1 Allen, 265.

The defendants are not, upon any principle of justice or equity, excused from the performance of the condition of their

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bond, on the ground that the decision of the court operated as an inevitable necessity to prevent the prosecution of the writ of review. The general doctrine on that subject, as stated in *Mill Dam Foundery* v. *Hovey*, 21 Pick. 417, is, that when a party by his own contract creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. The contract in this case was voluntarily made by the defendants for the purpose of obtaining the advantage of the supersedeas, and the consequent discharge of Bancroft from arrest. The law compelled the plaintiff to accept it whether he would or not, and he ought to have the benefit of it.

*Judgment for the plaintiff.*

*J. F. Pickering*, for the plaintiff.

*H. W. Muzzey*, for the defendant Butterfield.

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EZRA WILMARTH *vs.* WENDELL BANCROFT.

If a building which stands upon mortgaged land is partly destroyed by fire, the mortgagor has no right, without the mortgagee's consent, to sell such parts of the building as are saved; and if the same have been sold by a third person to whom he has delivered the same for that purpose, he cannot maintain an action against such third person to recover the sum received as the price thereof, if meanwhile the mortgagee has entered upon the premises for breach of condition, and has forbidden the payment to the mortgagor, and the value of the land is less than the amount of the debt secured by the mortgage.

GRAY, J. This action is brought to recover the amount received by the defendant from the sale of doors, blinds and other articles, which had been attached to and made part of a house and other buildings, and were saved from destruction when the buildings were destroyed by fire. The plaintiff, who was the owner of the right in equity of redeeming the premises from a previous mortgage, delivered these articles after the fire to the defendant to be sold, and they were sold by him. The mortgagee afterwards entered upon the land for breach of condition

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notified the defendant of her right to the premises and to these articles, forbade his paying to the plaintiff the money received for them, and has since remained in possession of the land. The value of the land was less than the amount of the debt secured by the mortgage.

The articles in question having been annexed to and made part of the real estate mortgaged, the mortgagee had the same title in them as in the rest of the mortgaged estate, and, even before entering into possession, could have maintained an action against the mortgagor if he had severed and removed them. *Cole* v. *Stewart*, 11 Cush. 181. The mortgagee never assented to their severance or conversion into personalty. The fire did not affect her title in them. When fixtures annexed to a mortgaged estate are severed without the mortgagee's consent, it makes no difference as against the mortgagee whether it is by act of the mortgagor, or of a third person, or by accident. *Bowles's case*, 11 Co. 81 *b*; *S. C. nom. Bowles* v. *Berrie*, 1 Rol. R. 181. *Rogers* v. *Gilinger*, 30 Penn. State R. 188. The fact that the old buildings were destroyed, so that the fixtures could not be again used in connection with them, did not terminate or affect the mortgagee's interest in the fixtures. *Goddard* v. *Bolster*, 6 Greenl. 427. *Rogers* v. *Gilinger*, above cited. If the mortgagor had rebuilt the house, he might doubtless have re-affixed them to it. If he had affixed them to a new house upon other land belonging to a third person, and so made them part of that land, the mortgagee might not have been able to recover the specific articles, or maintain an action against that person for their value, and might have been left to his remedy against the mortgagor. *Peirce* v. *Goddard*, 22 Pick. 559. *Fryatt* v. *Sullivan Co.* 5 Hill, 116; *S. C* 7 Hill, 529.

But in the case before us the articles in question had never been annexed to other land, and remained in construction of law a part of the mortgaged estate. Having been delivered by the mortgagor to the defendant without the mortgagee's consent, and the mortgagee having given the defendant notice of her title, he was justified in not paying to the mortgagor the proceeds of property which belonged to the mortgagee. The jury

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having been instructed otherwise, the defendant is entitled to a new trial. *Exceptions sustained.*

*C. P. Judd*, for the defendant.

*N. B. Bryant*, for the plaintiff.

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JOHN FOWLE *vs.* WILLIAM D. MERRILL & others.

A power of sale in a mortgage of land, which authorizes the mortgagee to advertise and sell at auction the mortgaged premises, including all equity of redemption in the mortgagor does not authorize a sale of the equity of redemption separately; and if the notice of sale states only that the mortgagor's equity of redemption will be sold, it is insufficient, and a sale of the premises under such a notice is invalid and passes no title to a purchaser which will bar the right of redemption.

HOAR, J. The plaintiff purchased of the assignees in insolvency of Enoch Bartlett, one of the defendants, the equity of redemption from a mortgage made by Bartlett to Merrill, another defendant, and brings this bill to redeem. The only defence to the bill is a sale and conveyance of the mortgaged premises under a power of sale contained in the mortgage deed; and if that sale was ineffectual, the right of redemption is not denied.

The objections urged against the regularity and lawfulness of the proceedings in the attempt to execute the power of sale are formidable as well as numerous; but one of them is so plainly decisive that it is needless to consider the rest.

The power in the mortgage authorized the mortgagee, upon default made by the mortgagor, "to enter into and upon all and singular the premises hereby granted or intended to be granted, and to sell and dispose of the same, and all benefit and equity of redemption of the said Bartlett, his heirs, &c., therein, at public auction, such sale to be upon the premises hereby granted, first giving notice of the time and place of sale by publishing the same once each week in three successive weeks in some newspaper printed in the county of Suffolk," &c. The only notice published announced that the mortgagee would sell at public auction, at a time named, "all the equity of redemption of the said

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Enoch Bartlett in and to all the premises contained in said mortgage deed, described as follows," &c. This was an advertisement of the intended sale of only the equity of redemption, and not of the whole estate in the land. It offered to the public only the mortgagor's interest in the premises, and did not include the mortgagee's. The power was to sell the whole estate, including the equity of redemption; and gave no authority to sell the equity of redemption alone. If only the equity were to be sold, it is difficult to see what would become of the mortgage. Certainly, a person who might wish to purchase would only infer from the advertisement that he could buy an estate on which the incumbrance would continue. As the notice of sale was not in conformity with the power of sale in the mortgage deed, the attempted sale in pursuance of it was ineffectual, and passed no title which can bar the right of redemption.

The case must therefore go to a master to ascertain and report the sum due on the mortgage, and the plaintiff will have a decree for redemption on the payment of that amount. If the tender made was sufficient, he will also be allowed his costs, which in that case are within the discretion of the court to refuse or grant. Gen. Sts. *c.* 140, § 21. It does not appear that the litigation has been occasioned by anything else than the attempt of the defendants to enforce and insist upon the invalid sale of the land, and the plaintiff is therefore the prevailing party, and entitled to costs unless there is some controlling equity against him.

*F. W. Palfrey*, for the plaintiff, cited, upon the point decided, *Smith* v. *Provin*, 4 Allen, 516; *Whiting* v. *Hadley*, 3 Ib. 357; *Fenner* v. *Tucker*, 6 R. I. 551; *Hoffman* v. *Anthony*, Ib. 282; *Fitzpatrick* v. *Fitzpatrick*, Ib. 64.

*H. G. Parker*, for the defendants. The notice of the sale of the equity was good. The agent may deviate from the letter of his authority, if he does not exceed his right or duty. Story on Agency, §§ 79, 85. 2 Kent Com. (6th ed.) 614. *Judson* v. *Sturges*, 5 Day, 556. The defendants are, in any event, entitled to costs, because their present position is owing to the laches of the plaintiff, who did not pay the mortgage debt when it became due.

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ESSEX COMPANY *vs.* LAWRENCE MACHINE SHOP & others.

The objection that all of the stockholders in a corporation are not made defendants in a bill in equity under *St.* 1862, *c.* 218, for the recovery of sums due from the corporation cannot be taken by demurrer, even though the bill shows that not all of the stockholders are joined; but the objection must, under § 9, be taken by plea or answer.

BILL IN EQUITY, alleging that the Lawrence Machine Shop was a corporation with a capital stock of $750,000; that the plaintiffs recovered judgment against said corporation for $37,747.62 damages, and costs of suit; that further proceedings were had (which were set out in detail), such as are required by statute for charging stockholders for the corporate debts; and that certain persons therein named were owners of shares to the number set against their respective names, and amounting in all to $284,700. The prayer was that said stockholders who were named might be ordered to pay to the plaintiffs and such other creditors as might become parties to the bill such sums as might be found due to them, and for further relief.

Certain of the defendants demurred to the bill, assigning for cause that it appeared by the bill that all of the persons called stockholders were necessary parties defendant, yet the plaintiffs had not made them all parties. The case was reserved for the determination of the whole court.

*C. W. Loring*, for the defendants.

*D. Saunders, Jr. & J. J. Storrow*, for the plaintiffs.

DEWEY, J. The personal liability of the stockholders of the Lawrence Machine Shop is one wholly created by statute. The *St.* of 1862, *c.* 218, creating this liability in certain cases, has also made provision for its enforcement, and instead of leaving the proceedings in such cases to be settled wholly by the precedents and established practice recognized as governing ordinary cases in equity, has fully and particularly provided for the case of an omission to join in the suit as defendants all persons liable as such, and has in § 9 enacted that "no such suit shall be abated by reason of the non-joinder of persons liable as defendants, unless the plaintiff, after being notified by plea or answer

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of the existence of such persons, shall unreasonably neglect to make them parties."

The omission of other persons who ought to have been joined must therefore be made to appear by plea or answer, and the court must be satisfied that the plaintiff has, after being notified in the manner thus required, unreasonably neglected to make them parties.

It is unnecessary to consider whether, under the practice adopted in courts of equity, in the absence of such statute provision, this demurrer could be sustained, or whether, if a demurrer is a proper mode to raise such objection, it would not be confined to cases where the bill on the face of it clearly shows such omission of proper parties, and that the plaintiff had the means to ascertain such parties, and that the case was not one of the class where from the number, or other circumstances, it was not necessary to join them.

For the reasons that have been stated, this demurrer must be overruled.

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GEORGE W. PRENTICE *vs.* WILLIAM DEHON & others.

One who has been an executor of an estate and resigned his trust cannot maintain a suit either at law or in equity against the administrator with the will annexed, to recover a debt due to him from the estate, but his remedy is in the settlement of the accounts of administration in the probate court.

BILL IN EQUITY against the administrators with the will annexed of the estate of William H. Prentice, brought under the provisions of *St.* 1861, *c.* 174, § 2, to obtain payment of a claim against the estate which had not been prosecuted within the time limited by law. The case was reserved by *Hoar*, J. for the determination of the whole court, upon facts which sufficiently appear in the opinion.

*J. G. Abbott & B. Dean*, for the plaintiff.

*J. D. Bryant*, for the defendants.

CHAPMAN, J. The plaintiff and his father William H. Prentice



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were copartners in trade on the 16th of March 1853, when the plaintiff's father died, leaving a will, in which the plaintiff and two other persons were named as executors. Letters testamentary were granted to them all, and by agreement with his co-executors the plaintiff carried on the business of the partnership till June 1st 1853, which was the period fixed by the articles of partnership for its termination. He then began to wind up the concern as surviving partner. He had not fully settled it on the 28th of May 1855, when, one of the executors having deceased, the others resigned their trust, and the defendants were thereupon appointed administrators with the will annexed.

If the plaintiff had never been executor, the present suit would have been his appropriate remedy, provided he has a good cause of action. But when he became executor his relation to the estate was changed. It came into the hands of himself and his co-executors, and if he was a creditor his debt was extinguished, because it would be absurd that he should bring an action against himself. Whenever the hand of the creditor is to pay as well as to receive the debt, it is held that the debt is extinguished. 2 Williams on Executors, (4th Amer. ed.) 937 1185. Hob. 10. 1 Salk. 306. If the executor is a debtor, the debt is extinguished, and must be accounted for as assets in his hands. Ib. In this commonwealth, if he is a debtor he charges himself with the amount due from himself in the account which he settles in the probate court. If he is a creditor, he credits to himself the amount due to him, and receives it out of the assets. If any controversy arises in respect to it, either party may have it tried by a jury, by means of an appeal to this court as the supreme court of probate. It was the duty of the plaintiff as surviving partner to close up the business and settle the copartnership account in the probate court in the first instance.

This duty remained after his resignation of his office, and it does not appear that he has yet discharged it. It is now the only legal method of prosecuting his claim, for his resignation did not have the effect to revive the debt after it had once been extinguished. Having been once extinguished, it could not be revived. Hob 10.

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In the recent case of *Munroe* v. *Holmes*, 9 Allen, 244, it was held that where an executor had died leaving the estate unsettled, his administrator could not maintain an action at law against the administrator *de bonis non* to recover a balance due to the executor, but must present an account to the probate court for settlement. It would seem to follow from that decision that if he resigns he cannot himself maintain such an action. The decision rests on the principle stated above.

Suits in equity are given by Sts. 1861, *c.* 174, and 1863, *c.* 235, in certain cases where an action at law is barred by the statute of limitations. The objection to the constitutionality of such acts is very grave, but it is not necessary in this case to decide whether it is valid. Certainly a suit in equity will not lie after such a bar, where no action could have been maintained before, and in the present case the plaintiff could not have maintained an action at any time after the estate of the testator was transferred to him as an executor. *Bill dismissed.*

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ALFRED E. GILES *vs.* BOSTON FATHERLESS AND WIDOWS' SOCIETY & others.

A testator gave to his wife the income of certain real and personal property, and directed that upon her death the same should be sold and the money arising therefrom should be paid over to a charitable society on condition that they should keep his tomb in repair. His wife lived several years, and during her life kept the tomb in repair. Two years after her death, and as soon as the society knew of the bequest, they voted to accept it, and assumed the care of the tomb. *Held*, that they were entitled to the benefit of the bequest

GRAY, J. Charles T. Hildreth by his will appointed his wife executrix, "or in case of her death, the person who shall be for the time then being treasurer of the Fatherless and Widows' Society of Boston, or the person the society may designate." He directed his body to be buried in his lot at Mount Auburn. He gave his wife his household goods and silver plate. He also gave her for life the income of his other property, real and

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personal, and ordered it to be turned into money before or on her death, and by the testator's "executor be forthwith paid to" that society, to be by them kept at interest, and the interest only appropriated to the wants of their applicants. "And the money is only given to them on their complying with the following conditions: I direct and enjoin upon the said society that they keep my lot, No. 291, at Mount Auburn, in repair, by the superintendent of Mount Auburn, who is to mow the grass three times a year, cultivating flowers in the borders and on the graves, and painting the iron fence once in three years, and renewing the fence when it becomes necessary."

The widow and executrix survived her husband about sixteen years, and during her life took care of the lot and paid the expense out of the income received from her husband's estate. The will had been admitted to probate, and the account of the executrix settled in the probate court, after publication of the usual notices. The society had no other notice or knowledge of the provisions of the will, until informed thereof two years after the widow's death by one of her heirs; and thereupon voted to accept the legacy, subject to the provisions of the will concerning it, obtained the appointment by the probate court of the plaintiff to be administrator *de bonis non*, and undertook, begun and have since continued to keep the lot in repair, as required by the will. The heirs at law nevertheless claim the property, upon the ground that the society were bound to keep the burial-place in repair from the time of the interment.

But the testator manifestly intended that his burial-place should be kept in repair by the party enjoying his property; that the property and the duty should go together; to intrust this office to the feeling and taste of his widow during her life, and to impose it upon the society when they should have received his bequest, and not before. If an administrator had been appointed upon the death of the widow, it would have been his duty to notify the society of the legacy and "forthwith" pay it to them, without waiting for any demand. The society could not receive the legacy except through an administrator. As soon as they had notice of the legacy, and within two years after they

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were entitled to it, they voted to accept it, undertook the performance of the conditions on which it was given, and procured the appointment of an administrator through whom they might receive it. Upon any reasonable construction of the condition, the society have done the utmost which the law could require of them under the circumstances of the case.

It may well be doubted whether this condition to maintain a private tomb or burial-place was not void, as tending to create a perpetuity. *Durour* v. *Motteux*, 1 Ves. Sen. 322. *Doe* v. *Pitcher*, 6 Taunt. 370; *S. C.* 2 Marsh. 71. *Lloyd* v. *Lloyd*, 2 Sim. (N. S.) 264. *Rickard* v. *Robson*, 31 Beav. 244. *Fowler* v. *Fowler*, 33 Beav. 616. *Dexter* v. *Gardner*, 7 Allen, 247. But if it was void, it did not defeat the gift. *Attorney General* v. *Greenhill*, 33 Beav. 193. *Drury* v. *Natick*, *ante*, 169. If it was valid, it has been sufficiently complied with. In either view, the society are entitled to a decree for the payment and transfer of the fund to them.

No question arises upon the validity or effect of the bequest over to the Trustees of the Newton Theological Seminary in case the Fatherless and Widows' Society should fail to perform the conditions of their bequest. *Decree accordingly.*

*J. D. Bryant*, for the Boston Fatherless and Widows' Society.

*G. D. Noyes*, for the heirs at law.

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NATHANIEL G. ELIOT *vs.* JOHN F. ELIOT.

A will which bears the genuine signatures of three competent subscribing witnesses, who signed their names simply as "witness to signature," with nothing further, may be admitted to probate, although neither of the two survivors of them recollects anything about the circumstances under which it was executed.

If the due execution of a will is controverted, on appeal from a decree of the judge of probate, devisees named therein have a right to appear as parties to establish it, although an administrator with the will annexed has been appointed and appears for the same purpose.

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Appeal from a decree of the judge of probate, allowing the probate of an instrument as the will of Andrew Eliot, dated May 9th, 1851.

The only objections raised were as to the mode of execution; and it was agreed that after the testator's death the will was found in the probate office, signed by the testator, and following his signature were these words: "Witness to signature, Lewis Lerow, Phins. Capen, Wm. H. Calrow." Capen died before the will was offered for probate, and the genuineness of his signature was admitted. Each of the other two witnesses testified that his signature was genuine; that he did not recollect the testator, or anything about the circumstances under which the will was executed; but that he had no doubt that the testator signed it in his presence, or acknowledged to him his signature thereto.

The will was admitted to probate by the judge of probate on the 18th of January 1864, and on the same day, no executor being named therein, an administrator with the will annexed was appointed, and from the decree making this appointment no appeal was taken; and the administrator accordingly has appeared in this court to maintain the will. Afterwards a devisee named in the will applied to be admitted as a party to maintain the will, but *Gray*, J. refused the application, and reported the case for the determination of the whole court.

*A. C. Clark*, for the devisee.

*F. W. Palfrey*, for the appellee, cited *Tilden* v. *Tilden*, 13 Gray, 110, and cases cited; *Crittenden* v. *Rogers*, 8 Gray, 452; *Russell* v. *Coffin*, 8 Pick. 143; *Burgoyne* v. *Showler*, 1 Rob. Eccl. 5 10; *In re Leach*, 12 Jur. 381; 1 Greenl. Ev. § 38 *a*.

*W. S. Leland*, for the appellant, cited Jarman on Wills, 74 Redfield on Wills, 238, 241; *Boldry* v. *Parris*, 2 Cush. 433.

Dewey, J. The question of the sufficiency of the evidence in the present case to authorize the finding of a legal execution of the will by the testator, and a due attestation thereof by the subscribing witnesses, seems to be fully settled by our decision in the case of *Ela* v. *Edwards*, 16 Gray, . All the points now taken in reference thereto were considered in that case, and

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the will was sustained. In some respects the attestation by the witnesses in that case was open to greater objection, as the attestation clause was wholly wanting, whereas in the present case the names were written under the words "witness to signature." There, as in this case, one of the attesting witnesses was not present in court, and the inference of due and legal attestation was to be drawn from the proof of the handwriting of the witness, and other circumstances favoring the presumption that the requisites of the statute had been complied with. For the authorities sustaining such ruling, we refer to the opinion given in that case.

In arriving at the decision sustaining the present will, we have taken the facts and evidence as they appear in the agreed statement drawn up and assented to by the appellants on the one side, and the administrator with the will annexed, appointed by the judge of probate upon the allowance of the will, and before the appeal was taken, as the other party. The refusal to admit the devisee named in the will as a party to maintain it before the supreme court of probate on the appeal was erroneous. He was a party in interest, and his right to appear and support the will was not affected by any proceedings of the judge of probate. His interest continued until the will was established in the appellate court, and therefore he was entitled to be heard. But this ruling has become immaterial, inasmuch as upon the facts stated and agreed by the other parties the will has been established.

The decree of the probate court admitting the instrument to probate as the will of Andrew Eliot is affirmed.

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## Lucy A. Bayley *vs.* Harum Merrill.

The lien of a boarding-house keeper, under Gen. Sts. c. 151, § 29, upon property of a boarder brought by him to the boarding-house is not terminated by a sale of the property in good faith to a third person, without the knowledge of the boarding-house keeper, and is valid and effectual for board furnished after the sale, under the original contract for board, until notice of the sale is given or the property is removed.

Tort against a constable for the conversion of certain furniture, attached by him on a writ against Charles M. Horton and wife. At the trial in the superior court, upon facts which are sufficiently stated in the opinion, *Lord*, J. ruled that the plaintiff had a lien upon the furniture, which still subsisted notwithstanding a conveyance which was proved from Charles M. Horton to a person who reconveyed the same to Horton's wife; and a verdict was accordingly returned for the plaintiff. The defendant alleged exceptions.

*M. Dyer, Jr.*, for the defendant.

*A. O. Allen*, for the plaintiff.

Hoar, J. The exceptions raise the question of the construction to be given to Gen. Sts. c. 151, § 29, which is as follows: "Boarding-house keepers shall have a lien upon the baggage and effects brought to their houses belonging to their guests or boarders, except mariners, for all proper charges due for fare and board." We are of opinion that the ruling of the judge who tried the case was right; and that the plaintiff had a lien upon the property which the defendant took and carried away The plaintiff was a boarding-house keeper. The property was brought to her house by a boarder to whom it belonged. He continued to board with her, not making any new contract for board, until the defendant took the property, and then owed her for his board. The defendant relies on the fact that, in the mean time, the boarder had sold the property, and had paid for his board in full up to the time of the sale. But the plaintiff had no notice of the sale; and we think that, within the meaning of the statute, she had a right to continue to furnish board, on the security of the lien, until such notice was given, if the

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property remained in the house. Otherwise, a boarder who had obtained credit on the strength of the lien which the law gave upon his property, might deprive the boarding-house keeper of the security by an immediate sale. The statute creates the pledge of the property, when the owner brings it, for whatever may be due while he stays.

This construction of the statute makes it unnecessary to decide whether the transfer of the property from the husband to the wife was fraudulent, or whether it was subject to any new lien for the board of the wife. Even if it were made in entire good faith we think the plaintiff entitled to maintain her action.

*Exceptions overruled.*

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## S. H. Whittemore & another *vs.* Robert O. Fuller & another.

The plaintiffs, who were shipbuilders, wrote to the defendants, who were iron merchants, saying, "We are ready for iron and spikes for a vessel of three hundred tons burthen; please give me your lowest price for bolt and refined iron. I suppose I shall buy for three vessels within three months, and please consider this." The defendants replied, naming prices which were unsatisfactory to the plaintiffs. The defendants wrote again, naming a lower price, and saying, "We make this offer with the understanding the quantity will not be over about twenty-five tons." The plaintiffs replied, accepting the defendants' proposal, inclosing an order for a small amount of iron, and requesting the defendants to fill it. The plaintiffs afterwards wrote to the defendants, "I am sorry if you made the price too low, but you must stand this vessel hard or soft, for we contracted to build it in view of the" aforesaid prices. *Held*, that the contract of the defendants was limited to the single vessel referred to, and that they were not bound to furnish iron to the amount of twenty-five tons, to be used in other vessels.

Chapman, J. The plaintiffs' declaration contains several counts. The first alleges, in substance, that the plaintiffs contracted with the defendants for twenty tons of bolt iron, at seventy-five dollars per ton, to be sent to the plaintiffs on demand, and that the defendants have refused to perform said contract fully. The second alleges the contract to be for the purchase and delivery of twenty-five tons of iron, to be delivered in four months, at seventy-five dollars per ton for common iron; also

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that the defendants agreed to furnish the plaintiffs with refined iron at the rate of eighty-five dollars per ton. The third alleges that the defendants contracted to deliver to the plaintiffs refined iron at eighty-five dollars per ton, and have overcharged them therefor at the rate of five cents per pound. The allegations are all extremely loose and inartificial.

The correspondence which took place between the parties in the summer and autumn of 1863 contains the evidence which was relied upon to prove the contract. It commenced with a letter from the plaintiffs to the defendants, dated July 10th, 1863. It is of the following tenor. "East Machias, July 10th, 1863. Messrs. Fuller & Dana: Dear Sirs — We have got well in; are ready for iron and spikes for a vessel of three hundred tons burthen; please give me your lowest price for bolt and refined iron; also Norway iron, spikes galvanized and not galvanized, and for copper spikes and Cumberland coal, per ton. Please answer as soon as possible, as there is no time to lose. I cannot dicker, come at once to your lowest price. I shall of course feel of the market. I suppose I shall buy for three vessels within three months, and please consider this. I remain yours truly, S. H. Whittemore." This letter proposed merely to purchase iron for the vessel which the plaintiffs were then building. The defendants' reply was dated July 16th, and stated their prices for iron if paid for within fifteen days. On the 22d of July the plaintiffs wrote again, declining to pay the prices stated by the defendants, and represented that their trade or the trade they might give to the defendants would amount to ten thousand dollars a year. But this representation cannot be regarded as an offer to purchase. It was merely an inducement to the defendants to lower their price in the hope of thereby securing a large future trade. The offer to purchase was still confined to the iron needed for the vessel mentioned in the first letter. The reply of the defendants, dated July 25th, is the letter which the plaintiffs rely upon as containing the contract declared on. The material parts are as follows: — "We want very much to sell you, and will sell as low as any one, but we do want to get a little profit. We will however offer the common iron at $75.

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We make this offer with the understanding the quantity will not be over about twenty-five tons, and all to be delivered in four months, less four per cent. if paid in fifteen days, or interest off if paid over that time. Hoping to receive your order, we remain yours truly, Fuller & Dana."

The "quantity" here spoken of evidently referred to the quantity needed for the vessel which the plaintiffs were then building, and was not a positive quantity of twenty-five tons, without regard to the use to which it was to be put. That the plaintiffs understood that there was to be no present contract for the sale of iron not wanted for that vessel is to be inferred from their reply dated August 5th. They say, "You only gave me the price of common iron, $75; but I take it you add $10 for refined, 7c for Norway and no extra charge for under ⅞ round; if you so understand the trade, you may fill the order; and if not, please re-mail the memorandum by return mail to me; but we hope we shall be able to trade long together and have all things right. We cannot get at the whole bill at this time, but will soon." There appears to have been an order for a quantity of iron inclosed in this letter, but it was only for a small amount. The "order" referred to does not appear to be for iron not needed for the vessel, and the "whole bill" was a bill of iron for that vessel, and for nothing beyond. That the plaintiffs so understood it up to August 17th is apparent from their letter of that date. They say, "You must stand this vessel hard or soft; for we contracted to build it in view of the $75 and $85 for iron. Should iron run lower before the time of the completion of this vessel, I should expect to pay the same price as at first." It was not till November 14th that they claimed a right to purchase twenty-five tons, and the defendants' reply denied that the contract was to be thus construed, unless the iron should be needed for the vessel. We think the defendants' construction was right, and that, as the construction given in the superior court was different, they are entitled to a new trial.

*Exceptions sustained.*

*D. H. Mason*, for the defendants.

*J. Nickerson*, for the plaintiffs.

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## Charles Waite *vs.* Calvin Dimick.

If A. advances money to B. and takes a conveyance of land from B., absolute in form, and at the same time executes an agreement to reconvey the same within two years if so requested, and not otherwise, upon repayment of the sum so advanced, with interest, A. has no right of action to recover back the money advanced by him, nor can he be allowed to prove by parol evidence that the transaction was intended by both parties as a loan.

Contract brought to recover the sum of $2000, money had and received. The writ was dated July 19th 1864; and the answer denied the plaintiff's claim, and set up the statute of limitations.

At the trial in the superior court, before *Ames*, J., the evidence tended to show that on the 9th of October 1857 the plaintiff held the defendant's note for $1000, and then let the defendant have $1000 more, taking a deed of certain real estate, and giving the following written agreement in return: "Boston, Oct. 9, 1857. Received of Calvin Dimick this day one deed of land, on the corner of Hampshire and Cambridge Streets, containing 10,000 square feet, more or less, for the sum of two thousand dollars; and it is agreed and understood between the parties that, if Calvin Dimick shall pay back the two thousand dollars and six per cent. interest within two years from this date, then the said Waite shall deed back the same land to the said Dimick, if so requested by said Dimick, and not without."

The note of $1000 was thereupon taken up and cancelled. The defendant has never repaid the $2000 or claimed a reconveyance of the real estate of the plaintiff. The plaintiff offered to prove by oral evidence that the real transaction between the parties was a loan of money, for which the land was to stand as security, and that the defendant had repeatedly recognized the transaction as of this character, and promised to repay the money; but the judge rejected the evidence, and ruled that the plaintiff was not entitled to recover. A verdict was accordingly rendered for the defendant, and the plaintiff alleged exceptions.

*J. Nickerson*, for the plaintiff.

*J. C. Dodge*, for the defendant.

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DEWEY, J. A party holding a legal promise to pay money, to secure the payment of which the debtor has also given a mortgage of real estate, may undoubtedly proceed for the recovery of his debt by a personal action for the same; but the objection which arises in the present case is as to the sufficiency of any competent evidence to establish such independent promise to pay the plaintiff any sum of money. Applying the well established rules of law to the case, and confining the legal obligations of the parties to such as arise upon the written instruments executed by them, no such promise is shown. The parties chose to give a different character to their dealings than that of a promissory note secured by a mortgage. On the contrary, the plaintiff gave up the note previously held for one thousand dollars of the alleged indebtedness, upon receiving the deed of the defendant of a parcel of land, and took no written promise from the defendant to pay any portion of that sum, or the remaining one thousand dollars that was paid by him. He received an absolute title to the premises, and gave back a stipulation securing to the defendant, if he should request it, a reconveyance of the same, upon his paying back two thousand dollars and six per cent. interest within two years.

The proposed oral evidence was properly rejected as incompetent. *Flint* v. *Sheldon*, 13 Mass. 446. *Lincoln* v. *Parsons*, 1 Allen, 388. *Howe* v. *Walker*, 4 Gray, 318. *Goodrich* v. *Tongley*, Ib. 379.

The plaintiff still holds the title to the real estate, and has, as it would seem, a perfect title thereto. No particular time was stated in which the defendant agreed to repay the money advanced to him, and the only stipulation having any bearing in reference thereto is that found in the plaintiff's contract binding himself to reconvey the premises, if this sum with interest should be paid to him within two years. This can hardly be deemed a stipulation for a loan for two years, but rather a security that the party should be restored to his estate, if such sum was paid within that period. If the plaintiff was entitled to charge the defendant for money had and received, by reason of this payment of two thousand dollars, it would be questionable whether

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the claim would not be held barred by the statute of limitations. It would be so, considering the indebtedness to have accrued at the time the money was advanced and the deed taken. The oral evidence offered, if admitted, would only show a loan of money without any promise to repay it at a future day named, leaving the time of payment to the common law rule in such cases, as a debt due on demand. We think that upon the proper effect being given to the written instruments by which the parties have declared their purposes as to this conveyance, and the payment of money by the plaintiff, they fail to establish a right to maintain the present action. The oral evidence being properly excluded, the exceptions must be overruled.

*Exceptions overruled.*

HENRY RANDALL *vs.* JAMES MCLAUGHLIN.

If the owner of two adjoining estates, through one of which a drain exists for the benefit of the other, conveys them both on the same day to different purchasers, the right to use the drain will not pass as an easement or appurtenance to the purchaser of the upper estate, provided a new drain can be built upon his own land by easonable labor and expense.

TORT to recover damages for refusing to permit the plaintiff to enter upon the defendant's land and examine and repair a drain leading from the plaintiff's land through the same, whereby the drain became obstructed and the water prevented from flowing off, causing various injuries.

At the trial in the superior court, before *Allen*, C. J., it appeared that the plaintiff and defendant were owners of adjoining estates, with brick dwelling-houses thereon, situated in Billerica Street in Boston. These houses were both drained through a drain which was built wholly on one of the lots, passing under one dwelling-house built on that lot. These estates were formerly owned by the same person, who on the 30th of June 1856 conveyed, by deeds of warranty, the lower one to the defendant

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and the upper one to another person from whom the plaintiff purchased the same. The plaintiff offered evidence tending to show that in December 1861 the refuse water did not flow off freely from his premises, as it had been wont to do, and he therefore went upon the defendant's premises and requested permission to examine the drain and repair the same if necessary; but the defendant refused to permit him to do so. Evidence was offered as to the cost of building a new drain on the plaintiff's premises.

The defendant asked the court to instruct the jury that the plaintiff, by the conveyance to him, was not entitled to the use of this drain, unless it was necessary to the beneficial use and enjoyment of his estate; that in order to determine this question the jury might consider whether a new drain could be built with reasonable labor and expense on the plaintiff's own land; and that, if such drain could be built on the plaintiff's own land with reasonable labor and expense, the plaintiff would not be entitled to the use of this drain.

The chief justice declined to instruct the jury as prayed for, but did instruct them that, if they were satisfied that the use of the drain was necessary to the plaintiff's beneficial enjoyment of his estate, he was entitled to the unrestricted enjoyment of the same; but if the use of said drain was not needed for the beneficial and full enjoyment of the plaintiff's estate, for the reason that no drain was needed, or that other means of drainage, then subsisting through the plaintiff's land to the common sewer over which the plaintiff had full control, were equally beneficial and sufficient for the purpose of draining the plaintiff's estate, then the plaintiff had no right to the use of said drain.

The jury returned a verdict for the plaintiff, with one dollar damages; and the defendant alleged exceptions. The plaintiff also alleged exceptions to other rulings of the chief justice, which became immaterial by the decision.

*J. W. Bacon*, for the defendant.

*J. F. Pickering*, for the plaintiff.

Hoar, J. The defendant's prayer for instructions qualified those which were given by the court in a material point. It

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asked the court to inform the jury what would constitute the necessity for the beneficial enjoyment of the plaintiff's estate which would make an easement pass as appurtenant to it by implication, or as parcel of the grant, where it was not expressly named. That such a necessity does not exist in the view of the law, when an equally beneficial drain could be built on the plaintiff's land with reasonable labor and expense, has been settled in this commonwealth by the decisions in *Johnson* v. *Jordan*, 2 Met. 234; *Thayer* v. *Payne*, 2 Cush. 327; and *Carbrey* v. *Willis*, 7 Allen, 364. The last case has been very recently reported, and we presume was not brought to the notice of the learned chief justice of the superior court. But while it was in the hands of the reporter, the authority of *Pyer* v. *Carter*, 1 Hurlst. & Norm. 916, the leading English case on which the plaintiff relies, was wholly denied by the chancellor of England in the opinion given in *Suffield* v. *Brown*, 10 Jur. (N. S.) pt. I, 111, which contains an elaborate review of the whole doctrine, resulting in conclusions substantially like those to which we came in *Carbrey* v. *Willis*.

The defendant's exceptions must be sustained, and a new trial granted; and this will make the exceptions taken by the plaintiff immaterial. *Defendant's exceptions sustained.*

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## Miles Sweeny *vs.* Old Colony and Newport Railroad Company.

If a railroad company have made a private crossing over their track, at grade, in a city, and allowed the public to use it as a highway, and stationed a flagman there to prevent persons from undertaking to cross when there is danger, they may be held liable in damages to one who, using due care, is induced to undertake to cross by a signal from the flagman that it is safe, and is injured by a collision which occurs through the flagman's carelessness.

Tort to recover damages for a personal injury sustained by being run over by the defendants' cars, while the plaintiff was

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crossing their railroad by license, on a private way leading from South Street to Federal Street, in Boston.

At the trial in this court, before *Chapman*, J., it appeared that this private way, which is called Lehigh Street, was made by the South Cove Corporation for their own benefit, and that they own the fee of it; that it is wrought as a way, and buildings are erected on each side of it, belonging to the owners of the way, and there has been much crossing there by the public for several years. The defendants, having rightfully taken the land under their charter, not subject to any right of way, made a convenient plank crossing and kept a flagman at the end of it on South Street, partly to protect their own property, and partly to protect the public. They have never made any objection to such crossing, so far as it did not interfere with their cars and engines. There are several tracks at the crossing. The only right of the public to use the crossing is under the license implied by the facts stated above.

On the day of the accident, the defendants had a car at their depot which they had occasion to run over to their car-house. It was attached to an engine and taken over the crossing, and to a proper distance beyond the switch. The coupling-pin was then taken out, the engine reversed, and it was moved towards the car-house by the side track. The engine was provided with a good engineer and fireman, and the car with a brakeman; the bell was constantly rung, and the defendants were not guilty of any negligence in respect to the management of the car or engine.

As the engine and car were coming from the depot, the plaintiff, with a horse and a wagon loaded with empty beer-barrels, was coming down South Street from the same direction. There was evidence tending to show that, as he approached the crossing, the flagman, who was at his post, made a signal to him with his flag to stop, which he did; that, in answer to an inquiry by the plaintiff whether he could then cross, he then made another signal with his flag, indicating that it was safe to cross; that the plaintiff started and attempted to cross, looking straight forwards; that he saw the car coming near him as it went



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towards the car-house; and that he jumped forward from his wagon, and the car knocked him down and ran over him and broke both his legs. It struck the fore wheel of his wagon and also his horse. If he had remained in his wagon, or had not jumped forwards, or had kept about the middle of the crossing, the evidence showed that he would not have been injured personally. His wagon was near the left-hand side of the plank crossing as he went.

The defendants contended that, even if the plaintiff used ordinary care, and if the flagman carelessly and negligently gave the signal that he might cross, when in fact it was unsafe to do so on account of the approaching car, the plaintiff was not entitled to recover, because the license to people to use the crossing was not a license to use it at the risk of the defendants, but to use it as they best could when not forbidden, taking care of their own safety, and going at their own risk; and also, that if the flagman made a signal to the plaintiff that he might cross, he exceeded his authority.

But the evidence being very contradictory as to the care used by the plaintiff, and also as to the care used by the flagman, the judge ruled, for the purpose of taking a verdict upon these two facts, that the defendants had a right to use the crossing as they did on this occasion, and that they were not bound to keep a flagman there; yet, since they did habitually keep one there, they would be responsible to the plaintiff for the injury done to him by the car, provided he used due care, if he was induced to cross by the signal made to him by the flagman, and if that signal was carelessly or negligently made at a time when it was unsafe to cross on account of the movement of the car.

The jury returned a verdict for the plaintiff for $7500; and the case was reserved for the consideration of the whole court.

*J. G. Abbott & P. H. Sears*, for the defendants. The defendants had, for all purposes incident to the complete enjoyment of their franchise, the right of exclusive possession and use of the place where the accident happened, against the owners of the fee, and still more against all other persons. *Hazen* v. *Boston & Maine Railroad*, 2 Gray, 574. *Brainard* v. *Clapp*, 10 Cush. 6

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Gen. Sts. *c.* 63, §§ 102, 103. The defendants were not bound to keep a flagman there, or exercise the other precautions prescribed for the crossing of highways or travelled places. Gen. Sts. *c.* 63, §§ 64–66, 83–91. *Boston & Worcester Railroad* v. *Old Colony Railroad*, 12 Cush. 608. The license or permission, if any, to the plaintiff to pass over the premises did not impose any duty on the defendants, but he took the permission, with its concomitant perils, at his own risk. *Howland* v. *Vincent*, 10 Met. 371, 374. *Scott* v. *London Docks Co.* 11 Law Times, (N. S.) 383. *Chapman* v. *Rothwell*, El., Bl. & El. 168. *Southcote* v. *Stanley*, 1 Hurlst. & Norm. 247. *Hounsell* v. *Smyth*, 7 C. B. (N. S.) 729, 735, 742. *Binks* v. *South Yorkshire Railway, &c.* 32 Law Journ. (N. S.) Q. B. 26. *Blithe* v. *Topham*, 1 Rol. Ab. 88; *S. C.* 1 Vin. Ab. 555, *pl.* 4; Cro. Jac. 158. The defendants did not hold out to the plaintiff an invitation to pass over. *Hounsell* v. *Smyth* and *Binks* v. *South Yorkshire Railway*, above cited. The allowing or making of such private crossing was not in itself such an invitation, and did not involve the duty of such precautions. The keeping of a flagman there was wholly for the purpose of preventing persons from crossing, not for the purpose of holding out invitations at any time. The signal that the plaintiff might cross was in answer to his inquiry, and was, at most, only revoking the prohibition, or granting permission; it was not holding out an invitation. The duty of the flagman was simply to warn persons against crossing; and if the flagman held out an invitation or even gave permission to the plaintiff to cross, he went beyond the scope of his employment, and the defendants are not liable on account thereof. *Lygo* v. *Newbold*, 9 Exch. 302. *Middleton* v. *Fowle*, 1 Salk. 282. Even if the defendants had carelessly held out an invitation to the plaintiff to cross, still they would not be liable; for the report shows that after such supposed invitation the plaintiff might, by the exercise of ordinary care, have avoided the injury; that the plaintiff was himself at the time in the wrong; and that his own negligence and fault contributed to the accident. *Todd* v. *Old Colony & Fall River Railroad*, 7 Allen, 207; *S. C.* 3 Allen, 18, and cases cited. *Denny* v. *Williams*, 5 Allen, 1,

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and cases cited. *Spofford* v. *Harlow*, 3 Allen, 177, and cases cited.

*S. J. Thomas*, for the plaintiff.

BIGELOW, C. J. This case has been presented with great care on the part of the learned counsel for the defendants, who have produced before us all the leading authorities bearing on the question of law which was reserved at the trial. We have not found it easy to decide on which side of the line, which marks the limit of the defendants' liability for damages caused by the acts of their agents, the case at bar falls. But on careful consideration we have been brought to the conclusion that the rulings at the trial were right, and that we cannot set aside the verdict for the plaintiff on the ground that it was based on erroneous instructions in matter of law.

In order to maintain an action for an injury to person or property by reason of negligence or want of due care, there must be shown to exist some obligation or duty towards the plaintiff, which the defendant has left undischarged or unfulfilled. This is the basis on which the cause of action rests. There can be no fault, or negligence, or breach of duty, where there is no act, or service, or contract, which a party is bound to perform or fulfil. All the cases in the books, in which a party is sought to be charged on the ground that he has caused a way or other place to be incumbered or suffered it to be in a dangerous condition, whereby accident and injury have been occasioned to another, turn on the principle that negligence consists in doing or omitting to do an act by which a legal duty or obligation has been violated. Thus a trespasser who comes on the land of another without right cannot maintain an action, if he runs against a barrier or falls into an excavation there situated. The owner of the land is not bound to protect or provide safeguards for wrongdoers. So a licensee, who enters on premises by permission only, without any enticement, allurement or inducement being held out to him by the owner or occupant, cannot recover damages for injuries caused by obstructions or pitfalls. He goes there at his own risk, and enjoys the license subject to its concomitant perils. No duty is imposed by law on the owner or

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occupant to keep his premises in a suitable condition for those who come there solely for their own convenience or pleasure, and who are not either expressly invited to enter or induced to come upon them by the purpose for which the premises are appropriated and occupied, or by some preparation or adaptation of the place for use by customers or passengers, which might naturally and reasonably lead them to suppose that they might properly and safely enter thereon.

On the other hand, there are cases where houses or lands are so situated, or their mode of occupation and use is such, that the owner or occupant is not absolved from all care for the safety of those who come on the premises, but where the law imposes on him an obligation or duty to provide for their security against accident and injury. Thus the keeper of a shop or store is bound to provide means of safe ingress and egress to and from his premises for those having occasion to enter thereon, and is liable in damages for any injury which may happen by reason of any negligence in the mode of constructing or managing the place of entrance and exit. So the keeper of an inn or other place of public resort would be liable to an action in favor of a person who suffered an injury in consequence of an obstruction or defect in the way or passage which was held out and used as the common and proper place of access to the premises. The general rule or principle applicable to this class of cases is, that an owner or occupant is bound to keep his premises in a safe and suitable condition for those who come upon and pass over them, using due care, if he has held out any invitation, allurement or inducement, either express or implied, by which they have been led to enter thereon. A mere naked license or permission to enter or pass over an estate will not create a duty or impose an obligation on the part of the owner or person in possession to provide against the danger of accident. The gist of the liability consists in the fact that the person injured did not act merely for his own convenience and pleasure, and from motives to which no act or sign of the owner or occupant contributed, but that he entered the premises because he was led to believe that they were intended to be used by visitors or passengers, and that such

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use was not only acquiesced in by the owner or person in possession and control of the premises, but that it was in accordance with the intention and design with which the way or place was adapted and prepared or allowed to be so used. The true distinction is this: A mere passive acquiescence by an owner or occupier in a certain use of his land by others involves no liability; but if he directly or by implication induces persons to enter on and pass over his premises, he thereby assumes an obligation that they are in a safe condition, suitable for such use, and for a breach of this obligation he is liable in damages to a person injured thereby.

This distinction is fully recognized in the most recent and best considered cases in the English courts, and may be deemed to be the pivot on which all cases like the one at bar are made to turn. In *Corby* v. *Hill*, 4 C. B. (N. S.) 556, the owner of land, having a private road for the use of persons coming to his house, gave permission to a builder engaged in erecting a house on the land to place materials on the road; the plaintiff, having occasion to use the road for the purpose of going to the owner's residence, ran against the materials and sustained damage, for which the owner was held liable. Cockburn, C. J. says: "The proprietors of the soil held out an allurement whereby the plaintiff was induced to come on the place in question; they held this road out to all persons having occasion to proceed to the house as the means of access thereto." In *Chapman* v. *Rothwell*, El., Bl. & El. 168, the proprietor of a brewery was held liable in damages for injury and loss of life caused by permitting a trap-door to be open without sufficient light or proper safeguards, in a passage way through which access was had from the street to his office. This decision was put on the ground that the defendant, by holding out the passage way as the proper mode of approach to his office and brewery, invited the party injured to go there, and was bound to use due care in providing for his safety. This is the point on which the decision turned, as stated by Keating, J., in *Hounsell* v. *Smyth*, 7 C. B. (N. S.) 738 In the last named case the distinction is clearly drawn betweer the liability of a person who holds out an inducement or

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invitation to others to enter on his premises by preparing a way or path by means of which they can gain access to his house or store, or pass into or over the land, and in a case where nothing is shown but a bare license or permission tacitly given to go upon or through an estate, and the responsibility of finding a safe and secure passage is thrown on the passenger and not on the owner. The same distinction is stated in *Barnes* v. *Ward*, 9 C. B. 392; *Hardcastle* v. *South Yorkshire Railway, &c.* 4 Hurlst. & Norm. 67; and *Binks* v. *South Yorkshire Railway, &c.* 32 Law Journ. (N. S.) Q. B. 26. In the last cited case the language of Blackburn, J. is peculiarly applicable to the case at bar. He says, "There might be a case where permission to use land as a path may amount to such an inducement as to lead the persons using it to suppose it a highway, and thus induce them to use it as such." See also, for a clear statement of the difference between cases where an invitation or allurement is held out by the defendant, and those where nothing appears but a mere license or permission to enter on premises, *Balch* v. *Smith*, 7 Hurlst. & Norm. 741, and *Scott* v. *London Docks Co.* 11 Law Times, (N. S.) 383.

The facts disclosed at the trial of the case now before us, carefully weighed and considered, bring it within that class in which parties have been held liable in damages by reason of having held out an invitation or inducement to persons to enter upon and pass over their premises. It cannot in any just view of the evidence be said that the defendants were passive only, and gave merely a tacit license or assent to the use of the place in question as a public crossing. On the contrary, the place or crossing was situated between two streets of the city, (which are much frequented thoroughfares,) and was used by great numbers of people who had occasion to pass from one street to the other, and it was fitted and prepared by the defendants with a convenient plank crossing, such as is usually constructed in highways, where they are crossed by the tracks of a railroad, in order to facilitate the passage of animals and vehicles over the rails. It had been so maintained by the defendants for a number of years. These facts would seem to bring the case within the

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principle already stated, that the license to use the crossing had been used and enjoyed under such circumstances as to amount to an inducement, held out by the defendants to persons having occasion to pass, to believe that it was a highway, and to use it as such. But the case does not rest on these facts only. The defendants had not only constructed and fitted the crossing in the same manner as if it had been a highway, but they had employed a person to stand there with a flag, and to warn persons who were about to pass over the railroad when it was safe for them to attempt to cross with their vehicles and animals, without interference or collision with the engines and cars of the defendants. And it was also shown that when the plaintiff started to go over the tracks with his wagon, it was in obedience to a signal from this agent of the defendants that there was no obstruction or hindrance to his safe passage over the railroad. These facts well warranted the jury in finding, as they must have done in rendering a verdict for the plaintiff under the instructions of the court, that the defendants induced the plaintiff to cross at the time when he attempted to do so, and met with the injury for which he now seeks compensation.

It was suggested that the person employed by the defendants to stand near the crossing with a flag exceeded his authority in giving a signal to the plaintiff that it was safe for him to pass over the crossing just previously to the accident, and that no such act was within the scope of his employment, which was limited to the duty of preventing persons from passing at times when it was dangerous to do so. But it seems to us that this is a refinement and distinction which the facts do not justify. It is stated in the report that the flagman was stationed at the place in question, charged among other things with the duty of protecting the public. This general statement of the object for which the agent was employed, taken in connection with the fact that he was stationed at a place constructed and used as a public way by great numbers of people, clearly included the duty of indicating to persons when it was safe for them to pass, as well as when it was prudent or necessary for them to refrain from passing.

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Nor do we think it can be justly said that the flagman in fact held out no inducement to the plaintiff to pass. No express invitation need have been shown. It would have been only necessary for the plaintiff to prove that the agent did some act to indicate that there was no risk of accident in attempting to pass over the crossing. The evidence at the trial was clearly sufficient to show that the agent of the defendants induced the plaintiff to pass, and that he acted in so doing within the scope of the authority conferred on him. The question whether the plaintiff was so induced was distinctly submitted to the jury by the court; nor do we see any reason for supposing that the instructions on this point were misunderstood or misapplied by the jury. If they lacked fulness, the defendants should have asked for more explicit instructions. Certainly the evidence as reported well warranted the finding of the jury on this point.

It was also urged that, if the defendants were held liable in this action, they would be made to suffer by reason of the fact that they had taken precautions to guard against accident at the place in question, which they were not bound to use, and that the case would present the singular aspect of holding a party liable for neglect in the performance of a duty voluntarily assumed, and which was not imposed by the rules of law. But this is by no means an anomaly. If a person undertakes to do an act or discharge a duty by which the conduct of others may properly be regulated and governed, he is bound to perform it in such manner that those who rightfully are led to a course of conduct or action on the faith that the act or duty will be duly and properly performed shall not suffer loss or injury by reason of his negligence. The liability in such cases does not depend on the motives or considerations which induced a party to take on himself a particular task or duty, but on the question whether the legal rights of others have been violated by the mode in which the charge assumed has been performed.

The court were not requested at the trial to withdraw the case from the jury on the ground that the plaintiff had failed to show he was in the exercise of due care at the time the accident happened. Upon the evidence, as stated in the report

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we cannot say, as matter of law, that the plaintiff did not establish this part of his case. *Judgment on the verdict.*

After the above decision was rendered, the verdict was set aside, by *Chapman*, J., as against the evidence.

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ANNA O. B. ELLIOTT *vs.* JOHN H. PRAY & others.

If there are two entrances to a store, and there is a trap-door between one of them and the stairs leading to the upper stories, which are verbally leased to a tenant with permission to use such entrance, the owners, who occupy the lower stories, are bound to use the trap-door with reference to the safety of those who have a right to pass there; and if they neglect to exercise suitable and reasonable precautions to guard against accident while the trap-door is open, they may be held liable in damages to a person having lawful occasion to pass to the upper rooms, who, while in the use of due care, falls through the trap-door and sustains injury by reason of their negligence.

If the owners of a store, which is situated upon a public street, have let the upper stories thereof to a tenant, and an entrance, directly in front of the stairs which lead to the upper stories, is so constructed and is so habitually kept open as to indicate that it is a proper entrance for those who have occasion to ascend the stairs, and there is a trap-door between it and the stairs, which is carelessly left open by them, they may be held liable in damages to one who, while in the use of due care, and having lawful occasion to ascend the stairs, is thereby induced to pass through that entrance, and falls through the trap-door and sustains injury by reason of their negligence.

TORT to recover damages for a personal injury sustained by the plaintiff by reason of falling through a trap-door while entering the defendants' building on Summer Street in Boston, on the 7th of October 1863.

At the trial in this court, before *Chapman*, J., a photographic view and a plan of the premises were put into the case, by which it appeared that there were two entrances to the building, one of which was No. 47, and led directly into a room occupied by the defendants for the sale of carpets, and the other, which was called No. 49, though no number was over the door, led into a passage about nine feet wide and ten feet long, which then, after ascending a few steps, extended about six feet further, to the foot of the stairs which led to the upper stories of the building. At

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the foot of the main flight of stairs, there was a door opening into the sale room of the defendants; and in the passage between the entrance and the first few steps there was a trap-door, occupying nearly one half of the width of the passage.

George L. Ide, a witness for the plaintiff, testified substantially as follows: "I am a manufacturer of cloaks and mantillas, and occupy the loft over the sale room of the defendants for a workshop. I hired it of the defendants by a verbal lease, and took possession on the 1st of September 1863, and have continued in possession since. The entrance to the shop is at No. 47; I direct people there. I had about one hundred and twenty-five women at work there. My sale room is elsewhere. Miss Warren was my foreman. I do not know whether she had engaged the plaintiff to work for me. No. 47 is through the sale room of Pray & Co. I was to have a right to hoist up and let down goods when Pray & Co. were not using their hoisting tackle, through the lower entrance, called No. 49. The defendants had a right to keep it closed, except as stated. Nothing was said to me about a right to pass through that lower entry, No. 49. I do not know where the general entrance to my room was for girls; I went as often one way as the other. When No. 49 was filled with carpets I went by No. 47. The lower door is sometimes fastened up. They closed the store Saturday afternoons. I hired the porter to keep it open if I wanted it. The lower door was generally open. Two folds of it were generally open, making an opening of from five to seven feet; and one fold closed. I know of no notice being given not to pass that way.

"Cross-examination. There are batten pieces there; a tackle and fall were necessarily there. After passing it you go up four or five steps; then there is a door, which shuts off the passage from them. Nothing was said about this place, except as to my using the hoisting apparatus. I supposed their entrance was at No. 47; I directed people that way; though I recollect Mr. Pray, senior, was opposed to my having the room on account of bringing so many girls through their sale room. They used the hoistway most of the time. I made no request that they should pass

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up a barrier before the trap-door to protect the passage. They have a right to stop the passage when they choose."

The plaintiff testified that on the morning of October 7th 1863 she was going into what she supposed to be Ide's shop; that she had been there once before, and some one in Pray's shop pointed it out as the way. The person appeared to belong there, and went and pointed out the place, and told her to go up stairs, and go as far as she could go. The outside door, No. 49, was then open. She went to call on Miss Holmes, and had made a contract with Miss Warren, through Miss Holmes, to work there. She went down Summer Street, with the sun shining in her eyes, and stepped up from the sidewalk into the passage; then it seemed to be but one step forward; then she fell. She saw no one in the entry, nor below, in the place where she fell. There was nothing to warn her of the trap-door. She was going to her work; and did not recollect any obstructions in the entry. She also testified to her injuries, and on cross-examination said that when she went down the street she had a parasol, but put it down before she got to the regular entrance of the store; she mistook the place. They were not then hoisting goods. She did not notice rope or hoistway or strips of board or battens. She looked for obstructions, and should have seen obstructions, but did not look for a hole in the floor.

Four of the girls employed by Ide testified that the general and ordinary passage was through No. 49, and that when this was obstructed they went through the store, but almost always could get in at No. 49. One of them said that when she first went there she did not know the way, and inquired and was directed by a young man at Pray's desk to No. 49. There was also other evidence as to the amount of the plaintiff's injury, and it was admitted that the condition of the hoistway at the time of the accident was caused by the defendants' servants.

Upon this evidence, with some other which it is unnecessary to recite here, the judge reserved the case, by consent of parties, for the consideration of the whole court, with an agreement tha they might draw any inferences, from such of the evidence as was competent, that a jury might; and that if, upon this

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evidence and these inferences, a legal cause of action was established, it should be sent to a jury to assess the damages; or if otherwise, that a verdict should be entered for the defendants.

*J. G. Abbott & M. Dyer, Jr.*, for the plaintiff, in addition to cases cited in the argument and opinion in the preceding case, cited *Pickard* v. *Smith*, 10 C. B. (N. S.) 470; *Barnes* v. *Ward*, 9 C. B. 392; *Beardsley* v. *Swann*, 4 McLean, 333; *Beatty* v. *Gilmore*, 16 Penn. State R. 463; *Freer* v. *Cameron*, 4 Rich. L. (S. C.) 228; *Brackett* v. *Lubke*, 4 Allen, 138; *Norwich* v. *Breed*, 30 Conn. 535.

*S. Bartlett*, for the defendants. If the plaintiff can recover in this case, it must be by reason of some undischarged duty of the defendants to her, arising out of the relations between them which result from the tenancy of her employer, Ide. Under the contract between the defendants and Ide, not only no agreement was made with Ide for the use of the passage as a passage, but the agreed use of it by both parties for hoisting, and the right to keep the door closed except for this use, exclude such agreement. The question then arises whether the defendants had publicly and improperly held it out as a safe, unobstructed private way, to such persons as might have lawful occasion to use it, so that it was the defendants' duty to protect them in such use. On the evidence, the utmost that can be maintained is, that the defendants suffered Ide's servants to pass there without prohibition. A person availing himself of such permission must take his chances of accident. See *Binks* v. *South Yorkshire Railway, &c.* 32 Law Journ. (N. S.) Q. B. 26; *Hounsell* v. *Smyth*, 7 C. B. (N. S.) 731; *Corby* v. *Hill*, 4 C. B. (N. S.) 556, and cases cited. The plaintiff herself was guilty of such negligence as should defeat her right of action. *Todd* v. *Old Colony Railroad*, 7 Allen, 207, and cases cited.

Bigelow, C. J. We are of opinion that this case is a proper one for the consideration of a jury, not on the question of damages only, but also to determine whether the facts are such as to render the defendants liable in this action. As the case stands on the report, we are not prepared to pronounce a decision in favor of either party Some of the essential facts involved in

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the issue are in controversy, and the determination of them depends on a variety of circumstances which cannot be intelligently and satisfactorily considered and applied by the court upon a case reserved. There are cases, and this seems to us to be one of them, the decision of which must turn in part on the credibility of witnesses, as indicated by their appearance and mode of testifying, and in part on the proper application of facts to the subject matter which render it peculiarly necessary and proper that they should be submitted to the judgment of practical men, in order to arrive at correct and safe results. For this reason, we do not deem it expedient to exercise the power reserved to the court by the assent of the parties, of determining whether, on the evidence stated in the report, this action can be maintained against the defendants.

Upon a new trial, the case will present itself in two aspects. One question will be, whether the right to use the entry or vestibule leading from the street to the stairway by which access was gained to the chambers of the building was included in the verbal lease under which the plaintiff's employer, the witness Ide, occupied the premises as tenant of the defendants. The testimony of this witness on this point, as stated in the report, is exceedingly vague and unsatisfactory. He appears to be an unwilling witness. He does not state distinctly whether the right to enter from the street through the place where the accident happened was included in the demise. All he says on this point is, that, in making his contract for a lease, nothing was said between him and the defendants about the right to pass through the lower entry. He does, however, state that the entrance to the shop occupied by him is through the doors of No. 47; that is, through the store on the first story or basement of the building. And yet he also says that he did not know where the general entrance was for the girls in his employment, and that he went as often one way as the other. By the testimony of the other witnesses in the case, it appears that the general and ordinary entrance to the upper rooms of the building was through the entry in question, and that the girls employed by Ide were in the constant habit of going to the room where they

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worked by passing from the street through this entry and thence up the stairway; and that entrance by any other way was an exception to the general usage. It also appears that this practice was well known to the defendants and persons in their employment. In this state of the evidence, taking into consideration the fact that the building was so constructed that access to the chambers was readily gained through the entry in question, which was in fact one of the purposes for which it was designed, we think it was a proper question to be submitted to the jury, whether the right to enter there was not understood by the parties to be included in the verbal demise by the defendants to the tenant of the upper rooms. If this was found in the affirmative, then the rule of law which would govern the case is very plain and simple. The defendants would be bound to use the trap-door there situated with reference to the fact that others had a right to pass and repass through the entry in going to and from the upper rooms of the building; and if the defendants were guilty of negligence, either by omitting to stop all passing through the entry while the trap-door was open and they were hoisting goods, or by failing to take any other suitable and reasonable precautions to guard against accident, they would be liable in damages to a person having lawful occasion to pass to or from the upper rooms, who, while in the use of due care, sustained injury by reason of their negligence.

There is another view of the evidence on which the plaintiff might be able to satisfy a jury that the defendants ought to be charged in this action. It appears by the testimony given at the trial, and by an inspection of a photographic representation of the premises which has been submitted to us, that the doorway leading to the entry in question is situated in the front line of a large warehouse on Summer Street; that it is closed by a door with three folds; that two of these folds were usually turned aside so as to make the entrance from five to seven feet wide; that when the door is thus opened, a wide staircase is visible, leading to the chambers of the building, and that the entry is about ten feet long from the door to the beginning of the staircase. These facts, if uncontradicted, and if there is nothing in

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the construction or appearance of the place to control the natural inference from them, would seem to show that the doorway and entry were intended as a proper mode of access to the upper part of the building from the street, and that it was the only direct one, as there was no other entrance except through the warehouse in the lower story; and that the situation and aspect of this part of the premises were such that they were held out by the defendants as a proper and suitable place for those having lawful occasion to go into the chambers or lofts above to enter for the purpose of ascending the stairs. It also appears that the defendants were cognizant of the fact that the entry was in constant daily use by more than one hundred workwomen, who entered and passed over the place where the trap-door was situated, in order to ascend the stairs to the upper rooms of the building where they were employed. This aspect of the case would seem to bring it within the principle of law fully considered and stated in *Sweeny* v. *Old Colony & Newport Railroad*, *ante*, 368, whereby a party is held liable in damages to a person injured by a defect or obstruction in a private way or passage into which he has been induced to enter for a lawful purpose by any invitation, allurement or enticement, either express or implied, held out to him by the party sought to be charged. Whether there are facts which ought reasonably to repel the inference arising from those to which we have adverted, and to show that no inducement or invitation of any kind was held out to the plaintiff — such, for example, as the appearance of the entry in question; that it was finished with battens; that chains and ropes were hanging there, and that it was designed for use as a hoisting place only, and not for passing to and fro — is a question which can be best determined by practical men, on a view of all the facts and circumstances bearing on the issue. Upon this part of the case, the proper instructions in matter of law would be substantially these: The warehouse of the defendants being upon a public street in the city, and being used by persons who had lawful occasion to pass from the street to the upper parts of the building, if the doorway and entry where the injury to the plaintiff happened were so constructed as to appear to afford a proper

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place for gaining access to the chambers, and they were left open by the defendants in such manner as to be held out to persons having occasion to go into the chambers as a suitable place of entrance thereto, who were thereby induced to enter, the defendants would be liable to any person lawfully passing there under or by reason of such inducement, who was injured in consequence of the carelessness of the servants of the defendants in leaving the trap-door open, whereby such person, using due care, fell and sustained personal injuries. *New trial ordered.*

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EDWARD ZOEBISCH *vs.* EBEN TARBELL & another.

One who is injured by falling through a trap-door in a portion of a factory which is not open to the public, but is intended exclusively for workmen, and where the owner had held out no invitation or allurement, express or implied, for him to enter, cannot recover damages therefor against the owner of the factory.

TORT to recover damages for a personal injury sustained by the plaintiff by reason of falling through a trap-door in the defendants' factory. The original plaintiff, Karl Brandt, having died since the action was commenced, it was prosecuted by the present plaintiff as administrator of his estate.

At the trial in the superior court, before *Ames*, J., the following facts appeared: The defendants are brass-founders and manufacturers of gas fittings, having a shop in Bromfield Street, and a foundery in Concord Street. The front room of the lower story of the latter building was used for brazing and annealing; and the principal foundery was back of this, three or four feet lower, and separated by a partition. In the latter room there was a scuttle, used for lowering heavy articles into the cellar and raising them therefrom. The only access from the street door to this room was through the front room. Upon the front door of the building there was a sign with the words "No admittance." And it was agreed that it might be taken as proved, if admissible, that the building was not open to the public, and that direction had been given to the workmen not to admit visitors. The



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doors had spring locks, and were usually kept closed; but persons coming to the front door on business were generally admitted. Persons also who lived in that neighborhood occasionally called and left orders there for repairs. But it did not appear that the inner room was visited at all, except by persons employed there.

The deposition of Karl Brandt was introduced, in which he testified that he was a manufacturer of plated ware; that on the 7th of December 1863 he called on the defendants at their foundery building in Concord Street and saw Eben Tarbell upstairs; that he made inquiry about certain brass castings which he had previously ordered, and Tarbell answered that they must be nearly ready, and sent one of the workmen down into the foundery; that Brandt followed, and went into the foundery, and there examined the castings, and left the foundery alone, and in going towards the door fell into the scuttle and was greatly injured; that he could not say that the workman was directed to show him into the foundery when he followed him, but nothing was said against his going, and no caution was given to him, or notice of any kind about the opening. On cross-examination he said that not a word was said to him or by him about his going into the foundery; and it appeared that he had never been in the building before.

The judge ruled that, assuming these facts to be true, the plaintiff was not entitled to recover, and directed a verdict for the defendants, which was rendered accordingly. The plaintiff alleged exceptions.

*T. F. Currier*, for the plaintiff.

*A. A. Ranney*, for the defendants.

Bigelow, C. J. The principles of law on which cases of this nature depend are fully stated in the recent case of *Sweeny* v. *Old Colony & Newport Railroad*, *ante*, 368. We cannot see that the facts proved at the trial furnish any plausible ground for holding the defendants liable. There is no evidence that the plaintiff's intestate entered that part of the premises where the accident happened in consequence of any invitation or inducement, either express or implied, held out by the defendants. Or

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the contrary, he went on his own mere motion to a place where customers or visitors were not accustomed to go, where there was no place prepared for them to pass, and which was designed only for workmen engaged in the business carried on there and who were familiar with the premises. Nor did he go to the place of the accident with the knowledge or assent of the defendants or their servants. He was at best acting under an implied license only. He therefore took on himself the risk of the perils to which he was exposed in going to places which were not intended or prepared for visitors or strangers.

*Exceptions overruled.*

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CHARLES W. FROST *vs.* GRAND TRUNK RAILROAD COMPANY.

If a railroad train is stopped, at night, merely for the purpose of allowing a train which is expected from the opposite direction to pass by, and no notice is given by the servants of the company to passengers that they may leave the cars, one who leaves the cars and walks into an open cattle-guard and receives a personal injury cannot maintain an action against the company to recover damages therefor; and it is immaterial that he was misinformed by some person not in the employment of the company that he must go and see to having his baggage passed at a custom-house, supposed to have been reached by the train, or that the train was near a passenger station, which was not the place of his destination.

TORT to recover damages for a personal injury sustained by the plaintiff by reason of stepping into an open culvert or cattle-guard, maintained by the defendants near a passenger station upon their railroad in Canada.

The following facts were agreed in the superior court: The plaintiff was a passenger upon a train of the defendants from Portland to Quebec. The train stopped near the Boundary Line Station in Canada, which was a regular passenger station, in a dark night, and was waiting for a train from the north to pass, and had been waiting for half an hour, and passengers had been walking about, out and in. The engine had passed about fifty feet beyond the station. There were no passengers to be received or discharged at that station, and the conductor did not

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announce it. The plaintiff was told by some one, whom he took to be the conductor, that he must go and look to his baggage, in reference to having it pass the custom-house. This person was not the conductor, and the custom-house was at a station nine miles distant. The plaintiff passed through the car in advance of the one in which he had a seat, and got out on the side towards the station, crossed the track, walked some eight or ten steps towards the station, and fell into the cattle-guard, which extended across both tracks of the railroad, was open, not lighted, and with no provision made for crossing it. The only light outside was a lantern on the platform of the station, more than one hundred feet distant. The cattle-guard was not safe for pedestrians, and other accidents had happened there, of which the defendants had knowledge.

Upon these facts judgment was rendered for the defendants; and the plaintiff appealed to this court.

*J. Nickerson*, for the plaintiff.

*G. O. Shattuck*, for the defendants.

Bigelow, C. J. The defendants do not appear to have been guilty of any breach of obligation or duty towards the plaintiff. The station in the vicinity of which the accident happened was not the one to which the plaintiff was destined and the defendants had agreed to carry him; they were not bound, therefore, to provide means for his safe egress from the cars and approach to the station; nor was the cattle-guard so near the place at which passengers might reasonably alight from the cars for any purpose as to impose on the defendants the duty of making it suitable and safe for persons to pass and repass over it. The facts show that it was more than one hundred feet distant from the platform of the building at the station. Nor does it appear that there was any act or thing done by the defendants' servants to induce the plaintiff to go to the place where he sustained injury. If there was any negligence or carelessness shown to exist at the time and place of the accident, it was on the part of the plaintiff, who, in a dark night, in a strange place, at a distance of several rods from a passenger station, and without sufficient reason or any inquiry of any person who could give

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him needful information, alighted from the cars and walked to a place which was not intended for passengers, and which the defendants were not bound to keep in a safe and convenient condition for their use. *Judgment for the defendants.*

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HENRY B. WHEELWRIGHT *vs.* JOHN GREER.
SAME *vs.* SAME.
SAME *vs.* SAME.

No statute of limitations in this commonwealth applies to complaints for the maintenance of bastard children.

The Gen. Sts. *c.* 72, § 2, and *St.* 1859, *c.* 239, § 3, authorizing certain officers to make a complaint for the maintenance of bastard children, if the woman entitled to make such complaint refuses or neglects to do so, do not apply to cases where bastard children were born before those statutes went into effect.

If a woman has made a complaint for the maintenance of her bastard child, and afterwards refuses or neglects to prosecute it, those statutes do not authorize the officers therein named to make a new complaint, but to prosecute the existing one.

METCALF, J. Each of these three cases is a complaint against the defendant under *c.* 72 of the Gen. Sts. which prescribes proceedings for "the maintenance of bastard children." The first two cases are complaints, dated October 2d 1863, and present one and the same question only, namely, whether § 2 of that chapter authorizes this complainant to make and prosecute these complaints. That section is a reënactment (in substance) of § 3 of *St.* 1859, *c.* 239, in which its provisions were first enacted. Previously, none but the mother of a bastard child could institute and prosecute a complaint against the alleged father; and he, if found guilty, was to be charged with the maintenance of the child, with the assistance of the mother, in such manner as the court should order, and to give bond to perform such order, and also to indemnify and save harmless, against all charges of maintenance, *any town* which might be chargeable with the maintenance of such child. Rev. Sts. *c.* 49, § 4. The new provisions, now contained in the Gen. Sts. *c.* 72, are these:

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By § 2, "If a woman entitled to make a complaint refuses or neglects so to do, when requested by an overseer of the poor of the place where she resides or has her settlement, or one of the alien commissioners, the superintendent of a state almshouse, or of the hospital at Rainsford Island, or a person authorized by either of them to make the request, or either of her parents, or her guardian, the persons so requesting may make the complaint; and when already made, if she refuses or neglects to prosecute the same, either of said persons may prosecute the case to final judgment, for the benefit of the parent, guardian, city, town or state." By § 7, if the defendant is found guilty, he is to be charged, as by Rev. Sts. *c.* 49, above cited, and be required to give bond "to indemnify and save harmless, against all charges of maintenance, *her parents* and any city or town *or the state* chargeable with the maintenance of such child." By *St.* 1863, *c.* 240, a board of state charities was established, and the board of commissioners in relation to alien passengers was abolished, and the duties of those commissioners in the prosecution of cases of settlement and bastardy were devolved upon the general agent of the board of state charities. And it is in the capacity of such general agent that this complainant has instituted these three prosecutions in behalf of the Commonwealth. In the first and second of them, each complaint alleges the birth of the child to have been before the act of 1859, *c.* 239, was passed — the first in 1854, and the second in 1858 — that the mother never made a complaint against the defendant, but neglected and refused so to do, although requested by the complainant. Upon trials in the superior court, it was ruled by *Lord*, J. that the Gen. Sts. *c.* 72, § 2, did not authorize this complainant to institute a complaint in a case in which the child was born before *St.* 1859, *c.* 239, was in force. And the cases are before us on exceptions taken to that ruling.

Another and distinct question, not passed upon at the trials is now raised by the counsel for the defendant, which we will first consider. He contends that these are not cases in which the mother was "entitled to make a complaint" against the defendant, in 1863, when these complaints were made by the

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complainant; the children having been born in 1854 and 1858, the one nine years and the other five years previously; that in 1863, the mother's right to institute a complaint was barred by the statute of limitations; and that it is only when she is "entitled to make a complaint," and refuses or neglects to do so, that any third person is authorized to interpose. As this objection was taken by the defendant in his pleadings in the superior court, he may now rightfully present it. But it cannot prevail. No statute of limitations bars a mother's right to complain against the father of her bastard child. She was therefore entitled to complain against him at the time when these complaints were made. *The King* v. *Miles*, 1 Sessions Cases, (2d ed.) 83. *Keniston* v. *Rowe*, 16 Maine, 38. *Murphy's case*, 3 Zabr. (N. J.) 180.

The other and main question for our decision is, whether the above cited provisions of the Gen. Sts. *c.* 72, are to have a retroactive operation; that is, whether they are to operate on cases existing at the time when they were enacted, and thus extend the liability of the defendant beyond that to which only he was oy law subject before they were enacted. And we are of opinion that they are not to have such operation, and that the ruling at the trials was correct. When these children were born, and for years afterwards, the defendant was not liable to be prosecuted on a complaint made by any one besides the mother, nor to be required, on being found guilty, to give bond to indemnify the state against charges for the support of the children. That chapter, therefore, if applied to these cases, creates a new obligation and imposes a new duty on the defendant, in respect to matters already past, and would have a retroactive operation, contrary to the principle that law is a rule of conduct prescribed for, and attaching itself to, the future actions of men. 1 Bl. Com. 46. Broom's Max. (3d ed.) 33, *et seq.*

In an early case before the supreme court of the United States, (3 Dallas, 397,) Mr. Justice Paterson said that, in general, retrospective laws of every description accord neither with sound legislation nor with the fundamental principles of the social compact and in 7 Johns. 500, Mr. Justice Thompson

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said that it would be an unjust "imputation against the legislature, that they intend a law to be of that description, unless the most clear and unequivocal expressions are adopted." To the like effect, see 10 Mass. 439; 2 Gray, 333; 1 Allen, 323; 15 Maine, 134; 2 Exch. 33, 43; 9 C. B. 567; 1 Best & Smith, 758; 8 Irish Law Rep. 80. But the words of the Gen. Sts. *c.* 72, § 2, are not clearly and unequivocally applicable to preëxisting cases. We therefore need not inquire how far, or in what cases, a statute made retrospective in express terms, or by necessary implication, would be held to be operative. On this subject there are conflicting decisions. See Sedgw. on Stat. and Const. L. 686–695. We discuss none of those cases, either in our own or other reports; because we decide the present cases on the ground that if these complaints can be sustained, they will oblige the defendant, if found guilty, to give bond, which the law did not before require of him, to indemnify the state against charges for the maintenance of the children. See *Wheelwright* v. *Sylvester*, 4 Allen, 59.

The following cases seem to the court to be decisive of the first two now before us: By *St.* 1817, *c.* 186, § 5, it was enacted that "the inhabitants of any town or district within this commonwealth, who have incurred expense for the support of any pauper, whether he was legally chargeable to them by means of his settlement or not, may recover the same against such person, his executors or administrators, in an action of assumpsit for money paid." But in the case of *Medford* v. *Learned*, 16 Mass. 215, in which the plaintiffs had expended money for the support of the defendant, his wife and child, as paupers, before and after said statute was passed, and sued him for reimbursement, it was decided that they could recover only so much as they had thus expended after the statute went into operation; that though the words of the statute, "who have incurred expense," if grammatically used, imported a past consideration, yet that the legislature could not have intended that the statute should have a retroactive effect, by creating a debt or obligation on a consideration that was past, and was not of itself a legal foundation for a promise; and that, moreover, it was not within the constitutional

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power of the legislature to create such new obligation. In *Brunswick* v. *Litchfield*, 2 Greenl. 28, where the settlement of a person was transferred, by the operation of a legislative resolve, from one town to another, it was decided that the town to which the settlement was transferred was not liable for the support of that person as a pauper before the statute was passed. So a statute making stockholders in corporations personally liable for corporate debts cannot be applied to such debts contracted before the passing of the statute. *Coffin* v. *Rich*, 45 Maine, 507. It was provided by a statute of New York, that "it shall be lawful for any party to a suit, who shall have obtained a verdict in his favor, to tax interest upon the amount of such verdict, as costs, from the time of the obtaining of the same to the time of the perfecting judgment thereon." It was decided that the charge of interest could not be made on a verdict returned before the statute was passed. *Bailey* v. *Mayor, &c. of New York*, 7 Hill, 146. See also 2 Shaw's Digest, 1328, *pl.* 10.

We see no difference in principle between a statute that requires a person to pay money, and a statute that requires him to give a bond which may oblige him to pay money, which he was not before liable to pay.

In these two cases the exceptions are overruled.

In the third of these cases, Margaret Raymond made and swore to a complaint in the police court of Boston, charging the defendant, in due form, as the father of her bastard child, born since the General Statutes took effect, to wit, on the 19th day of July 1861. A warrant was issued on that complaint, and the defendant was apprehended thereon and carried before the said court, and there gave bond to appear at the superior court to answer to said complaint and abide the order of that court. The said Margaret never entered her complaint in that court, and this complainant preferred to said police court the complaint on which the question in this case is raised. The matter and form of that complaint are thus: The complainant alleges the facts above stated, (setting forth a copy of the complaint made by the said Margaret,) and concludes with this prayer: "Therefore the said

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Wheelwright, having reason to believe and believing that said John Greer is the father of the said bastard child of said Margaret Raymond, and accuses him of being the father of said child, and that said child was begotten by said Greer, and born of said Margaret, at the places and times set forth in the complaint of said Margaret, which is made a part of this complaint; the said Margaret having been constant in her accusation, the said Wheelwright, in behalf of, and for the benefit of, the Commonwealth, prays that the said Greer may be apprehended and held to answer to this accusation, and further dealt with according to law." A warrant was issued on which the defendant was apprehended, and the same proceedings were thereupon had, which had before been had on the complaint of the said Margaret. A supplementary complaint was made and entered in the superior court, on which the case was heard, and said court ruled "that the right of the Commonwealth to institute original proceedings was a statute right, and that a condition precedent to such a right was the failure of the mother to prosecute; that as the mother had not neglected or refused to institute proceedings, the right of the present complainant had not accrued; that the statute had made provision for cases like the case at bar, by authorizing the present complainant to prosecute the complaint originally instituted by the mother, so that there is no cause for extending, by construction, the right of the party beyond the strict language of the law; and that this complaint could not be maintained." To this ruling the complainant alleged exceptions.

By the Gen. Sts. *c.* 72, § 2, when a woman refuses to make a complaint, others may make it; and when she refuses or neglects to prosecute a complaint which she has made, others "may prosecute the case to final judgment." The corresponding provision in *St.* 1859, *c.* 239, § 3, was, that when she had made a complaint, and neglected or refused to prosecute it, others might "prosecute to final judgment such complaint already made." We have no doubt that the meaning of both provisions is the same; and that by prosecuting the case, when a complaint has been made by the mother, which she neglects or refuses to

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prosecute, is meant the prosecution of "such complaint," and not the making and prosecuting of a new one.

In this case, the accusation against the defendant was made by the complainant, and the defendant was arrested on a warrant issued on, and was held to answer to, "this accusation."

It was stated by the complainant's counsel that the original complaint, to which a warrant is annexed, is sometimes lost, or destroyed, and cannot be prosecuted. How, if at all, a third party can proceed in such case, is a question the consideration of which must be deferred till it is regularly before the court for decision.

In this third case the exceptions are overruled.

*G. W. Searle*, for the defendant.

*J. G. Locke*, for the complainant.

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MEMORANDUM: On the thirty-first day of August 1865, the Hon. Theron Metcalf resigned the office of Justice of this Court, which he had held since the twenty-fifth day of February 1848.

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# CASES

ARGUED AND DETERMINED

IN THE

# SUPREME JUDICIAL COURT

FOR THE

## COUNTY OF BERKSHIRE, SEPTEMBER TERM 1865, AT LENOX.

PRESENT:

HON. GEORGE T. BIGELOW, CHIEF JUSTICE.
HON. CHARLES A. DEWEY, }
HON. REUBEN A. CHAPMAN, } JUSTICES.
HON. HORACE GRAY, JR., }

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### COMMONWEALTH *vs.* ELIZA MEAD.

If an indictment contains two counts, the first of which charges the defendant with having been a common seller of intoxicating liquors during a certain period, and the second with having made a single sale within the same period, the defendant may be tried upon the first count, although he has pleaded guilty to the second; and if found guilty upon the first count judgment may be rendered thereon against him, and a *nolle prosequi* entered upon the second count.

INDICTMENT containing two counts. The first count charged the defendant with having been a common seller of intoxicating liquors from the 1st of February 1864 to the time of finding the indictment, in January 1865. The second count charged her with a single sale made on the 1st of June 1864. The defendant pleaded guilty to the second count and not guilty to the first count.

At the trial in the superior court, *Brigham*, J. instructed the

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jury that they might nevertheless find her guilty on the first count, which they accordingly did. The defendant alleged exceptions.

*A. J. Waterman*, for the defendant.

*J. C. Davis*, for the Commonwealth, was not called on.

DEWEY, J. The case of *Commonwealth* v. *Jenks*, 1 Gray, 490, states the principle which must govern the present case. The jury there had found the defendant guilty, as to all the counts contained in the indictment, by a general verdict of guilty. The first count charged him as a common seller of intoxicating liquors, from a certain day named to another period also named; and the second count charged a single sale on a day named, which was embraced in the period of the offence set forth in the first count. Upon this state of the case, it was insisted, on the part of the defendant, that no judgment could properly be made against him upon either count, as the conviction of the party as a common seller must be a bar to an indictment for a single sale within the same period, and the conviction of a single sale during that period would operate to bar the charge of being a common seller, and thus the whole indictment must fail. But the court allowed a *nolle prosequi* to be entered upon the second count, and a judgment to be entered upon the first; taking the distinction between the case of a mere verdict, and one where judgment has been entered. In *Commonwealth* v. *Lahy*, 8 Gray, 459, this distinction was clearly stated and applied. While there has been only a conviction by a verdict, but no judgment entered therein, the case is open to a motion in arrest of judgment or other proceedings to secure the proper judgment, as well as to the entry of a *nolle prosequi* by the prosecuting officer, of any portion of the indictment that should not be further pursued. But it is only after a judgment has been entered upon the verdict that it can be made a ground for sustaining a plea of former conviction or acquittal of the same offence.

It is true that in the present case the defendant pleaded guilty to the second count. But that does not affect the principle. Such plea of guilty is a mere substitute for a verdict upon evidence offered by the government. It leaves the defendant with

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all the rights he would have under a conviction by a jury, as to motion in arrest, &c., and it also leaves the prosecuting officer equally free to discontinue as to the count. Had this been a case arising upon a verdict by the jury as to both the counts, we have seen that the objection now urged could not have availed the defendant, and he might properly be sentenced upon the first count. This case does not differ in principle. The rights of the defendant are fully protected in both cases by a discontinuance, before judgment and sentence, of the second count charging a single sale. *Exceptions overruled.*

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COMMONWEALTH *vs.* MARY MEAD.

If unauthorized sales of intoxicating liquor are proved to have been made by a child under the age of fourteen years, in the presence of its mother and in obedience to her directions, it is necessary, in support of an indictment against the child for making such sales, to establish, as a distinct fact, its legal capacity to commit a crime.

INDICTMENT for being a common seller of intoxicating liquors.

At the trial in the superior court, before *Brigham*, J., the Commonwealth proved several sales made by the defendant within the time named in the indictment, and offered no other evidence. It was proved on the part of the defendant that she was a daughter of Eliza Mead, and at the time of said sales was under twelve years of age, living with her parents, and that the sales were made by her in the dwelling-house of her parents, and under and by direction of her mother, to whom the liquors belonged. The defendant also put in evidence a license granted to her mother to sell liquors, under the internal revenue acts of the United States.

The defendant requested the court to instruct the jury that if she, at the time of making the sales, was under twelve years of age, and if the sales were made under the general direction of the mother, in the dwelling-house of the parents of the defendant, then she could not be convicted under this indictment The judge declined so to rule, and instructed the jury that the

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license was no defence. if the sales were made in violation of the statutes of Massachusetts; and that if the defendant did, in the dwelling-house of her parents, and while she lived with them, and by direction of her mother, and while under twelve years of age, make three or more separate sales of her mother's intoxicating liquors within the time alleged in the indictment, they should find her guilty.

The jury returned a verdict of guilty, and the defendant alleged exceptions.

*A. J. Waterman*, for the defendant.

*J. C. Davis*, for the Commonwealth.

Bigelow, C. J. The question of the legal competency of the defendant to commit the offence charged in the indictment was distinctly raised in the present case by the fact proved at the trial, that she was under twelve years of age. The rule of the common law is perfectly well settled, that a child between the ages of seven and fourteen is not presumed to be *doli capax*, and the question whether, in committing an offence, such child in fact acted with intelligence and capacity, and an understanding of the unlawful character of the act charged, is to be determined by the jury upon the evidence, and in view of all the circumstances attending the alleged criminal transaction. 1 Hale P. C. 22–27. 1 Archb. Crim. Pr. 10. 1 Russ. on Crimes, (7th Amer. ed.) 4. *Rex* v. *Owen*, 4 C. & P. 236. This rule is uniformly applied in cases where children under fourteen and above seven years of age are charged with murder or other felonies. *A fortiori*, it is applicable where they are accused of lesser offences, or with the commission of acts coming within the class of *mala prohibita*. These do not so violently shock the natural moral sense or instinct of children, and would not be so readily recognized and understood by them to be wrong, or a violation of duty, as the higher crimes of murder, arson, larceny, and the like.

Although the attention of the judge at the trial was drawn to the fact that the defendant was of tender years, so that no presumption of legal capacity to commit crime existed, he wholly omitted to give any instructions from which the jury could be

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led to infer that it was their duty to find that the defendant knew the unlawful character of the act with which she was charged, before they could render a verdict of guilty against her. For aught that we can see, the verdict was rendered without any consideration of the legal competency of the defendant to commit the offence alleged in the indictment. The case was one which seems to us to have required an explicit instruction on this point. It is true that it was not necessary to show actual knowledge by the defendant of the unlawfulness of the act, if sufficient legal capacity to commit crime was otherwise proved. If capacity is established, knowledge may be presumed. Nor is it necessary to offer direct evidence of capacity. It may be inferred from the circumstances under which the offence was committed. But nevertheless it is to be established as a distinct fact. We are unable to see anything in the facts set out in the exceptions which tend to prove that the defendant was cognizant of the illegal character of the act which she committed. She seems to have made the illegal sale in the presence of and in obedience to the express command of her mother. This fact of itself had some tendency to show that the child did not understand that the act which she was told by her parent to commit was wrong, and, in connection with the request for instructions which was made by the defendant's counsel, required the judge to give full and explicit instructions on the subject of legal competency to commit crime. The omission of such instructions was an error, which, in our judgment, renders it necessary that there should be a new trial of the case.

*Exceptions sustained.**

* At the same term, a like decision was made in the case of COMMONWEALTH *vs.* JOHN MEAD, who was a son of Eliza Mead, and under fourteen years of age, and who made sales of intoxicating liquors under circumstances similar to those mentioned in the above case, and who was found guilty of being a common seller under similar instructions to the jury.

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## COMMONWEALTH *vs.* JOHN HAGARMAN.

A plea of guilty before a magistrate cannot be withdrawn after the case has been carried to the superior court on appeal, without leave of that court; and if leave to withdraw the plea of guilty has been refused in that court, and a jury empanelled in the case, they may properly be directed to return a verdict of guilty, without the introduction of any evidence on the part of the Commonwealth.

A complaint which charges the commission of a continuing offence from a day named "unto the day of the date hereof," and which is dated "this fourteenth day of January A. D. 1864," alleges the time with sufficient certainty, and is not bad by reason of the use of the figures. The date of the jurat may also be expressed in figures.

If a complaint against John Smith for a criminal offence contains several counts, and the first count contains his name in full, the subsequent counts may describe him as "the said John," although the complainant's first name is also John.

COMPLAINT made against the defendant, containing three counts. The first count charged him with having been a common seller of intoxicating liquors in violation of law "on the first day of November now last past, and from thence unto the day of the date hereof." The second and third counts charged that "said John" on days named made single sales, in violation of law. The complaint was dated "this fourteenth day of January A. D. 1864," and was sworn to "January 14th 1864" by John M. Seeley and Albert D. Whitmore.

At the trial before the magistrate the defendant pleaded guilty and was duly sentenced, and appealed to the superior court. In the superior court he asked leave to retract his plea of guilty, which was refused. A jury were empanelled, in the usual form in appeal cases, the clerk stating that the defendant had pleaded guilty in the court below. No evidence was offered on either side, and the judge directed the jury to return a verdict of guilty, which they accordingly did. The defendant moved in arrest of judgment for various reasons, which sufficiently appear in the opinion; but the motion was overruled. The defendant alleged exceptions.

*H. W. Bishop*, for the defendant, cited, as to the form of the complaint, *Commonwealth* v. *Hutton*, 5 Gray, 89; *Commonwealth* v. *Clark*, 4 Cush. 596.

*J. C. Davis*, for the Commonwealth.



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CHAPMAN, J. 1. The defendant had no legal right, without leave of court, to retract the plea of guilty which he had made before the trial justice.

2. On his trial in the superior court, his admission of guilt in the court below, and the proof of that admission by the record, were competent and sufficient to authorize a verdict against him.

3. The complaint sufficiently alleges the time when the defendant committed the offence. *Commonwealth* v. *Kingman*, 14 Gray, 85.

4. The name of the defendant is sufficiently stated in the complaint. There is no uncertainty in the second count occasioned by the use of his mere Christian name.

5. The fact that the date of the complaint, on "this fourteenth day of January A. D. 1864," is partly written in Arabic figures, with the initials A. D. for the year, does not vitiate the complaint. In *The State* v. *Reed*, 35 Maine, 489, this form of stating not only the date of the complaint, but also the time when the offence was committed, was held to be good, and several American authorities are cited in support of the position, though the court express the opinion that it would be better for criminal pleaders to adhere to the ancient practice of framing complaints exclusively in the English language.

6. The jurat is sufficient, as it states that the complaint was sworn to, and the date is properly stated. *Commonwealth* v *Keefe*, 7 Gray, 332.

*Exceptions overruled.*

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COMMONWEALTH *vs.* MORRIS CROTTY & others.

A warrant to arrest "John Doe or Richard Roe, whose other or true name is unknown," without any further description or means of identification of the person to be arrested, is void; and any person sought to be arrested upon such a warrant may lawfully resist, and third persons may lawfully aid him in such resistance, using no more force than is necessary to prevent the arrest.

INDICTMENT for a riot.

At the trial in the superior court, before *Brigham*, J., the grounds on which the district attorney relied were as follows: Calvin Peaslee had made a complaint to the police court of Lee, charging that "John Doe or Richard Roe, whose other or true name is to your complainant unknown," had committed an assault and battery upon him; upon which complaint a warrant, which was attached to the complaint, was issued against "John Doe or Richard Roe, whose other or true name is to your complainant unknown, named in the foregoing complaint." Neither the complaint nor the warrant contained any further description or means of identification of the person to be arrested. Upon this warrant, a deputy sheriff with assistants proceeded to arrest Morris Crotty, one of the present defendants, as the real person chargeable. Crotty resisted the arrest on the ground that the warrant was invalid, and the other defendants aided him. The officer testified that he did not rely upon any description in the warrant, but upon information otherwise obtained, for the identification of Crotty.

The judge instructed the jury that the above warrant authorized the arrest of Crotty, provided he was the person accused in the complaint attached to the warrant, notwithstanding the complaint or warrant did not contain his name, any description of his person, or any statement of the reason why his person was not described, and notwithstanding the person accused was described as "John Doe or Richard Roe;" and that Crotty's assault upon and resistance of the officer were unlawful acts, and if Crotty, or either of the defendants with him, and with other persons, or said Crotty with other persons to the number

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of three or more in all, mutually assisted each other in assaulting and resisting said officer while attempting to arrest Crotty under said warrant, and they acted in a violent and tumultuous manner, such persons were guilty of a riot.

The jury returned a verdict of guilty against some of the defendants, and they alleged exceptions.

*M. Wilcox*, (*I. Sumner* with him,) for the defendants.

*J. C. Davis*, for the Commonwealth, submitted the case without argument.

Bigelow, C. J. We cannot entertain a doubt that the warrant on which the officer attempted to arrest one of the defendants at the time of the alleged riot was insufficient, illegal and void. It did not contain the name of the defendant, nor any description or designation by which he could be known and identified as the person against whom it was issued. It was in effect a general warrant, upon which any other individual might as well have been arrested, as being included in the description, as the defendant himself. Such a warrant was contrary to elementary principles, and in direct violation of the constitutional right of the citizen, as set forth in the Declaration of Rights, art. 14, which declares that every subject has a right to be secure from all unreasonable searches and seizures of his person, and that all warrants, therefore, are contrary to this right, if the order in the warrant to a civil officer to arrest one or more suspected persons or to seize their property be not accompanied with a special designation of the persons or objects of search, arrest or seizure. This is in fact only a declaration of an ancient common law right. It was always necessary to express the name or give some description of a party to be arrested on a warrant; and if one was granted with the name in blank, and without other designation of the person to be arrested, it was void. 1 Hale P. C. 577. 2 Ib. 119. Foster, 312. 7 Dane Ab. 248. 1 Chit. Crim. Law, 39. *Mead* v. *Haws*, 7 Cow. 332, and cases cited.

This rule or principle does not prevent the issue and service of a warrant against a party whose name is unknown. In such case the best description possible of the person to be

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arrested is to be given in the warrant; but it must be sufficient to indicate clearly on whom it is to be served, by stating his occupation, his personal appearance and peculiarities, the place of his residence, or other circumstances by which he can be identified. 1 Chit. Crim. Law, 39, 40.

The warrant being defective and void on its face, the officer had no right to arrest the person on whom he attempted to serve it. He acted without warrant and was a trespasser. The defendant whom he sought to arrest had a right to resist by force, using no more than was necessary to resist the unlawful acts of the officer. An officer who acts under a void precept, and a person doing the same act who is not an officer, stand on the same footing; *Shadgett* v. *Clipson*, 8 East, 328; *Rex* v. *Hood*, 1 Mood. C. C. 281; *Hoye* v. *Bush*, 2 Scott N. R. 86; *Pearce* v *Atwood*, 13 Mass. 324, 344; *Sanford* v. *Nichols*, Ib. 286; *Commonwealth* v. *Kennard*, 8 Pick. 133; and any third person may lawfully interfere to prevent an arrest under a void warrant, doing no more than is necessary for that purpose. 1 Chit. Crim. Law, 44. *The King* v. *Osmer*, 5 East, 304–308.

The defendants, therefore, in resisting the officer in making an arrest under the warrant in question, if they were guilty of no improper or excessive force or violence, did not do an unlawful act by lawful means, or a lawful act by unlawful means, and so could not be convicted of the misdemeanor of a riot, with which they are charged in the indictment.

The instructions under which the case was submitted to the jury did not meet this aspect of the case. It must therefore go to a new trial. *Exceptions sustained.*

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## Thomas D. Curtis & wife *vs.* Patrick Noonan & wife.

A grant of land with a right to lay a pipe across other land of the grantor lying south of the conveyed premises, sufficient to draw one third of the water from an existing aqueduct to the conveyed premises, does not authorize the grantee or his assigns to take water from the aqueduct at a point above the grantor's land, even with the consent of the owner of the land above.

If the owner of land to which water is brought through an aqueduct conveys a portion of the same, with a right to take water to the conveyed premises by a pipe from the aqueduct on his land, and thereafter orally consents that his grantee may take the water to which he is entitled from the aqueduct at a point above the grantor's land, he cannot withdraw such consent after it has been acted upon; and he will be liable in damages for cutting off a pipe laid by the grantee in pursuance of such consent.

Tort, praying for relief in equity, for cutting off a water-pipe. The case was reserved for the decision of the whole court upon the report of a master in chancery, by which it appeared to be as follows:

Asa Sprague, being the owner of a tract of land in Great Barrington, bounded on the east by a highway, conveyed out of this tract three lots next to the highway, with houses which he had built thereon, to Benjamin F. Gilmore, "together with the privilege of having the lead pipe, which now conducts water from my other land above on to these premises, be and remain as it now is, and also the privilege of going on thereto for the purpose of replacing or repairing the same." Gilmore conveyed, first, to Wood (from whom by mesne conveyances it afterwards came to Alger) the southern lot, "together with a right to lay a pipe to the spring of water near these premises and using one third of said water by paying one third of the expenses of maintaining and fixing said spring;" secondly, to Van Hoesen (who afterwards conveyed to Wilson) the northern lot, and "also the right and privilege to lay a pipe under ground across my other premises next south of these herein described and above the buildings thereon, sufficient to draw one third of the water from the present aqueduct to these premises, on condition that said Van Hoesen shall hereafter maintain one third of the expenses of said aqueduct;" and, lastly, to Loomis (who afterwards conveyed to Margaret Noonan, the female defendant) the middle

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lot, "also hereby conveying all my right to water from the spring on the premises of said Sprague, together with my right to enter the premises of said Sprague for the purpose of laying or repairing the pipe from said spring."

The spring from which the water comes is an ancient natural spring upon the land retained by Sprague, and would afford plenty of water for the use of the four families claiming rights thereto, except in times of remarkable drought. The main pipe was laid by Sprague before his conveyance to Gilmore from the spring to the lot now owned by Noonan, where the water was discharged into a tub, and thence overflowed into the road The pipes which carry the water to Alger's and Wilson's houses were laid by Alger and Van Hoesen respectively, connecting with the main pipe on Noonan's lot about six feet east of Sprague's boundary line.

Wilson afterwards conveyed to Mary D. Curtis, the female plaintiff, the northern half of his lot, "together with a right to lay a pipe across my land lying south of the conveyed premises, and the right to take and carry in said pipe to the conveyed premises one half of the water to which I am entitled under the deed of said Van Hoesen to use, subject to the conditions in said deed expressed; reference to said deed or the record thereof, and to the deed of Benjamin F. Gilmore to said Van Hoesen or the record thereof, being had, for description of my right to water, one half of which is hereby conveyed." The plaintiffs built a dwelling-house upon the land so conveyed by Wilson; but the water would not flow to it if the connection was made with the main pipe at the same point as the others; and the plaintiffs obtained a license from Mrs. Sarah A. Sprague, the present occupant of Sprague's land, to dig up the soil for the purpose of laying a pipe connecting with the main pipe on that land at a higher level and thence across the corner of Wilson's lot to their house, and paid damages for this injury to the soil; and before making this connection had an interview with the female defendant, who told them that they might attach their pipe where they chose. The orifice through which the water used by the plaintiffs was taken was exceedingly small, and they drew less

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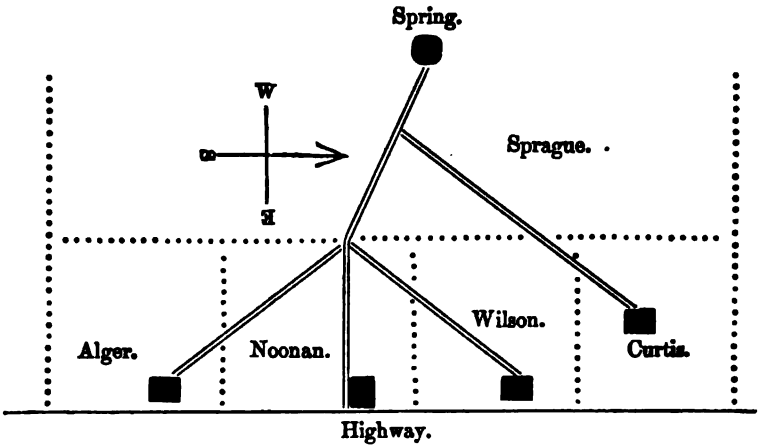
water than was granted by Wilson's deed. It was not denied that the condition in that deed as to keeping the aqueduct in repair had been fulfilled. The defendants afterwards cut off the plaintiff's pipe near its intersection with the main pipe, and so prevented the plaintiffs from using the water, and threatened to repeat such acts.

The situation of the pipes is shown by the following plan, which was made part of the case.




*I. Sumner & M. Wilcox*, for the plaintiffs.

*H. L. Dawes*, for the defendants.

Gray, J. The plaintiffs seek to maintain the right to take water through the pipe laid by them across the lands of Sprague and Wilson upon two grounds: 1st. Under the deed from Wilson; 2d. Under the oral permission of Mrs. Noonan and Mrs. Sprague.

1. The right granted by Wilson to Mrs. Curtis was to lay a pipe across Wilson's land, and to take through it half of the water to which Wilson was entitled under the deeds from Van Hoesen to him and from Gilmore to Van Hoesen, to which Wilson's deed referred for a description of his right to water; and upon referring to the deed from Gilmore that right is shown to be to lay a pipe across the next adjoining lot on the south then owned by Gilmore, and now by Mrs. Noonan. The grant

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by Wilson to Mrs. Curtis was thus limited to taking water from the main pipe on the Noonan lot across that lot and Wilson's, and did not authorize water to be taken from the main pipe upon the land of Sprague before it reached the Noonan lot. It therefore becomes necessary to consider the other ground of the plaintiffs' claim.

2. The rules of law by which this must be tested are well settled in this commonwealth. An easement in real estate can be acquired only by deed, or by prescription, which presupposes a deed; but it may be destroyed or extinguished, abandoned or renounced, in whole or in part, by a parol license granted by the owner of the dominant tenement, and executed upon the servient tenement. *Dyer* v. *Sanford*, 9 Met. 402. *Morse* v. *Copeland*, 2 Gray, 304, 305. The pipe laid by the plaintiffs was not through the land of Noonan, but through the land of Sprague. The case finds that the plaintiffs have not interfered with the flow of Mrs. Noonan's share of the water to her house. The utmost interest which she had in the plaintiffs' share of the water was to have it run from Sprague's land through her own to the plaintiffs'. The only right given by her to the plaintiffs was to draw off so much water before it reached her own land. So that Mrs. Noonan granted no easement over her own land, but simply renounced an easement over the land of a third person. The new easement which the plaintiffs sought to acquire, in place of the one which they, with Mrs. Noonan's concurrence, renounced, was to be derived not from her, but from Mrs. Sprague. As the plaintiffs had no deed from Mrs. Sprague, the license from her, though executed and paid for, yet, having been executed on her land, might doubtless have been revoked by her. But the case shows no such revocation, nor any authority from her to the defendants to enter upon her land and cut off the pipe which she had licensed the plaintiffs to lay. So long as the license from Mrs. Sprague to the plaintiffs is unrevoked, their possession under it entitles them to a remedy against mere wrongdoers like these defendants. *Northam* v. *Bowden*, 11 Exch 70.

*Decree for the plaintiffs.*

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## Nathan Deyo *vs.* John Jennison & another.

If a debtor who resides in another state is fraudulently induced by procurement of his creditor to bring into this commonwealth property which by the laws of the place of his residence is exempt from attachment, in order that it may be attached here, and the same is accordingly so attached, the attachment is void; and both the creditor and the officer who makes the attachment are liable in damages as trespassers, although the officer did not know of the fraud and simply obeyed the terms of his precept.

Tort for the conversion of a pair of horses, wagon, some harnesses, and other articles of personal property.

At the trial in the superior court, before *Vose*, J., there was evidence tending to show the following facts: Deyo and Jennison both lived in the state of New York. Jennison had a claim against Deyo, and Deyo had the property in controversy, which under the laws of New York was exempt from attachment. Jennison caused fraudulent misrepresentations to be made to Deyo that a man in Egremont wished to employ him to transport a load of goods to Poughkeepsie, New York, and thereby induced him to come with his team to Egremont, where the property was attached on the 8th of October 1863 on a writ in favor of Jennison, and kept for about fifteen days, when the same was returned, with the exception of one horse which died on the same day of the attachment, from some sudden disease. The jury found specially that the plaintiff was induced by this fraud to bring his property into this commonwealth, and that the officer who made the attachment (who was the other defendant) had no knowledge of the fraud. On the 22d of October the same officer made a second attachment of the same property on another writ in favor of the plaintiff, brought upon the same claim.

Truman, the officer, was chosen a constable of Egremont in March 1862, and there was evidence tending to show that he gave a bond, as required by Gen. Sts. *c.* 18, §§ 61, 62, which has since been lost. In March 1863 he was again chosen, but gave no new bond until October 21st 1863.

The judge instructed the jury that if Jennison procured the

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bringing of this property by the plaintiff into this commonwealth by a fraudulent misrepresentation made for the purpose of enabling Jennison to attach the property here, and the property was attached here under those circumstances, such attachment was void, and both defendants were wrongdoers and liable in damages; and the plaintiff would be entitled to recover the value of the property taken, at the time it was taken, less the value of the property returned, with interest on that sum from the time of the taking, together with a reasonable compensation for the injury caused by the detention of the property; that the burden of proof was on the plaintiff to establish such fraud; that if no fraud had been practised, then the liability of the defendants would depend on the question whether Truman had any authority as a constable on October 8th 1863 to make the attachment; that if in 1862 he complied with the law requiring a bond to be given by him, he had the requisite authority, and the defendants would not be liable; and that if no bond had been given in 1862, the execution of the bond on October 21st 1863, before the second attachment, would not excuse the first attachment.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

*T. P. Pingree, Jr.*, for the defendants. The officer was justified by his precept. *Williams* v. *Babbitt*, 14 Gray, 141. *Clarke* v. *Whipple*, 2 Gray, 410, and cases cited. *Russ* v. *Butterfield*, 6 Cush. 242. *Tubbs* v. *Tukey*, 3 Cush. 438. *Wilmarth* v. *Burt*, 7 Met. 257. The act of Jennison was not such a fraud as would render the attachment void.

*I. Sumner & M. Wilcox*, for the plaintiff.

Dewey, J. The illegality of the attachment of the property of the plaintiff on the 8th of October 1863 is well established by the application, to the facts of the present case, of the legal principles so deliberately settled and so fully stated in the cases of *Parsons* v. *Dickinson*, 11 Pick. 352, and *Ilsley* v. *Nichols*, 12 Pick. 270. These cases declare the principle that a valid and lawful act cannot be accomplished by any unlawful means, and wherever such unlawful means are resorted to, the law will

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interpose to restore the party injured thereby to his rights. In the former of these cases unlawful means had been used to keep the property of the debtor from passing to the vendee, and to continue its liability to attachment until the next day, and an attachment was thereupon made; but it was held that an attachment made under such circumstances was ineffectual, and the parties making it were trespassers. In the other case the attachment had been preceded by an unlawful breaking open of a dwelling-house; and such unlawful means having been used to expose the property to the officer holding a writ of attachment, it was held that the attachment was unlawful and invalid.

In the present case the jury have found that Jennison, the creditor, procured the bringing of this property into this commonwealth by a fraudulent representation made to the plaintiff, for the purpose of enabling Jennison to attach the property here, the same previously being within the limits of the state of New York, and where by the laws of that state such property was not attachable. The attachment made under such circumstances falls within the principle we have stated, and thus the taking and detaining of the property were acts of trespass, and the parties thus illegally participating in the same became liable therefor.

But it is said that as to the attaching officer the jury have found that he did not know of such fraudulent acts on the part of Jennison before he took the property. And it is further said that, having a lawful precept from a magistrate which commanded him to attach the property of the plaintiff, his acts in obedience to that precept are justified.

These positions may be properly answered together. An officer takes many responsibilities for violation of the legal rights of others, where he acts unwittingly and in perfect good faith. Take the case of an ordinary attachment, made at the request of a creditor, of goods owned by A., on a writ of attachment against C. The officer may have no knowledge that the goods belong to A. or even are claimed by him, but he is no less a trespasser if the goods really belong to A. The only indemnity for the officer in that case would be a recurrence to his employer

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upon his promise or bond of indemnity; and this he may always require. Take the other class of cases, more analogous to the present, where the writ directs generally an attachment of the goods and chattels of A. The officer attaches the goods of A., but the property attached is a cow or a swine, and it is subsequently made to appear that this property was exempt from attachment. It is no justification to the officer that the property belonged to A. The direction to attach always includes the idea of attachable property, and the officer takes it at his peril in this respect, and if it is not attachable he is a trespasser, and is liable to be sued as such. *Gibson* v. *Jenney*, 15 Mass. 205. *Howard* v. *Williams*, 2 Pick. 80. *Foss* v. *Stewart*, 14 Maine, 312. *Bean* v. *Hubbard*, 4 Cush. 85. *Brown* v. *Wait*, 19 Pick. 470.

If it be urged that the cases of attachment of articles exempted by law from attachment are unlike the present, as the exemption in those cases is by statute, and the officer must therefore be presumed to know it, it may be replied, in the first place, that such exemption often depends upon facts not easily known or learned by the officer, and often upon very nice and acute distinctions taken by the court. But the answer is a broader one, that they only illustrate a principle equally applicable to other cases, where, by reason of preceding unlawful acts on the part of the attaching creditor, the property is not liable to the attachment by a writ in his favor, as was the case in *Parsons* v. *Dickinson*, 11 Pick. 352. Being wrongfully brought within the jurisdiction, and not attachable for that cause, all persons actively participating in the unlawful act are trespassers.

The officer and the creditor thus both became liable to the owner of the goods for this trespass, and no subsequent attachment made by the same creditor and officer on the 21st of October affected his rights. *Otis* v. *Jones*, 21 Wend. 394. *Barratt* v. *Price*, 9 Bing. 566.

In the view we have taken of this case, it is unnecessary to consider the question of the sufficiency of the official bond given by the officer in 1862, to authorize service of process under an appointment in the succeeding year. Under the decisions of this court, as to bonds given for the performance of duties in an

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office annual by law, there would seem to be ground of objection to the enforcement of such bond. But as the defendants have no reason for complaint on that subject, and as the maintenance of this verdict does not depend upon that question, we waive its further consideration.

The ruling as to damages was sufficiently favorable to the defendants, and upon the whole case neither of the defendants has any ground of exception to the rulings of the superior court.

*Exceptions overruled.*

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SAMUEL SCOVILL *vs.* GRAHAM A. ROOT.

An officer who, in returning an attachment of fifty tons of pig iron, certified that he could not remove it on account of its weight and bulk, and thereupon posted the notice and deposited the copy required by Rev. Sts. c. 90, § 33, and did not take the iron into his actual custody, is not responsible, in the absence of any evidence to show that he might have immediately removed it, if without his consent or knowledge it is afterwards taken away so that it cannot be found to be taken on execution.

TORT against the sheriff of Berkshire for the default of his deputy. At the trial in the superior court, before *Vose*, J., a verdict was returned for the defendant by direction of the judge, upon facts which are sufficiently stated in the opinion, and the case was reported for the determination of this court.

*I. Sumner & M. Wilcox*, for the plaintiff.

*H. L. Dawes & T. P. Pingree, Jr.*, for the defendant.

CHAPMAN, J. The tort which is alleged against the defendant's deputy is, that he failed to keep or retain in his custody certain property which he had attached on a writ in favor of the plaintiff against Kinsley & Palmer. The return of the deputy, so far as it relates to the property in question, is as follows: "And also on the same day I attached fifty tons of pig iron, the property of the within named Lyman Kinsley and Mason S. Palmer, being in the furnace in the town of Lanesborough in said county, which on account of the weight and bulk thereof I could not remove. I posted a notice of said attachment upon said iron, and I made an attested copy of this writ, without the

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declaration, with my return thereon so far as relates to the attachment of the iron, and deposited the same with the town clerk of said Lanesborough."

The plaintiff was permitted to testify that he delivered the writ to the deputy, went with him to the furnace and saw him attach the pig iron and mark it, and told him he wanted him to be very particular in doing the business, and in his custody of the property; and that from what he knew of Palmer he was afraid Palmer would get the iron away from him. It was conceded that the iron had been taken by the Briggs Iron Company, under a claim of right. This was all the evidence which related to the attachment and custody of the property.

The plaintiff contends that the property does not belong to the class mentioned in Rev. Sts. *c.* 90, § 33, namely, "articles of personal estate which, by reason of their bulk or other cause, cannot be immediately removed," and therefore that the attachment of it by the deputy in the manner prescribed by that and the next section, and leaving it in the furnace where it was found, was insufficient. The purpose and meaning of the statute have been discussed in *Hubbell* v. *Root*, 2 Allen, 185, and *Polley* v. *Lenox Iron Works*, 4 Allen, 329, and the cases there cited.

If the statute applies to such property as cord wood and charcoal piled up, millstones, logs, timber and wood, hewn stones, and hay in a barn, the court cannot judicially see that it does not apply to fifty tons of pig iron stored in a foundery. The plaintiff offered no evidence tending to show that the iron was not such property as, by reason of its bulk or other cause, could not be immediately removed, and the officer's return as to that matter must be taken as true. Indeed, the plaintiff's declaration does not allege that the return is false, but alleges mere neglect to keep the property after it was attached. But if the mode of attachment was proper, no subsequent neglect is proved on the part of the deputy such as is suggested in *Hubbell* v. *Root*, *ubi supra*, by reason of which he might become liable.

*Judgment on the verdict.*

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WILLIAM G. MERRILL *vs.* EDWARD NARY.

If the judge in the trial of a civil case, at the request of the jury, and without the knowledge of the parties, allows them to have a copy of the General Statutes in the jury room while deliberating on their verdict, their verdict will be set aside.

WRIT OF ENTRY. At the trial in the superior court, before *Rockwell*, J., a verdict was rendered for the tenant. The demandant moved that this verdict be set aside. It appeared that "by consent of the judge the volume of the General Statutes was handed to the officer in charge of the jury, to be taken to their room, he having brought to the court a request from the jury to have it;" and the motion was overruled. The demandant appealed to this court. It was conceded, at the argument, that the sending of the volume to the jury was unknown to the demandant or his counsel.

*J. E. Field*, for the demandant.

*H. W. Bishop & B. Palmer*, for the tenant.

BIGELOW, C. J. Upon deliberate consideration, we are constrained to say that we cannot give our sanction to the action of the court below in allowing, without the consent of the parties to the cause, the volume of the General Statutes to be sent to the jury after they had retired to consider of their verdict. This was not only irregular and contrary to the uniform practice in our courts, but it tended directly to confound the proper provinces of the court and jury, which ought, in the trial of civil cases, to be kept carefully distinct, and it also practically deprived the parties of the right of knowing the principles of law on which the jury acted in the rendition of their verdict.

No one doubts that, on the civil side of the court, the jury are bound to follow the instructions of the court in matters of law. This is the only legitimate mode in which they can receive the information necessary to enable them to apply the facts before them to the rules by which they are to be guided and governed in the performance of their duty. They cannot properly seek knowledge or advice on matters of law involved in an issue from any other source. Nor can they act on their own preconceived opinions. They are bound to follow with scrupulous

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fidelity the instructions of the court. A strict adherence to and observance of this principle is essential, not only on grounds of public policy, in order that there may be a uniform, consistent and stable interpretation and application of the rules of law, but also that it may be made certain that the rights and duties of litigant parties are protected and enforced in courts of justice. These important ends cannot be surely attained, unless the advice and direction of the court on all questions of law arising in the course of a trial by jury are given in open court, and suitable precautions are taken in order to prevent the minds of jurors from being instructed or influenced by information or knowledge derived from other sources. If this course is not taken and strictly adhered to, there would be no safety in the ordinary presumption that the instructions of the court are fully understood and properly applied by the jury. On the contrary, it would be quite as reasonable to suppose that they acted on views and opinions derived from other sources concerning matters of law involved in an issue submitted to them, as that they followed those which they received in the instructions of the court. The practical result would be, that, although the law might be laid down with precision and accuracy by the court, there could be no certainty that the rules prescribed would be acted on by the jury, and parties would be deprived of the right to know the principles on which their cases had been determined, and the privilege of obtaining a revision of them, if they were erroneous or mistakenly applied. The only regular and safe mode of conducting trials is, for the court to instruct the jury on all material points before they retire to deliberate upon their verdict, and, if they have occasion for further information, they should return into court and state the questions on which they wish for further advice, and receive in open court such directions as may seem to the judge material and necessary. This was the course adopted by Lord Tenterden, in *Burrows* v. *Unwin*, 3 C. & P. 310. In that case, after the jury had retired they sent a message to the court, requesting that Selwyn's Nisi Prius might be sent to them. The counsel for both parties consented that the book should be sent to the jury. But the court



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refused the request, and further instructions were given in open court.

Every one familiar with the practice of the law and the administration of justice in our courts knows that cases not unfrequently turn on nice distinctions, and that the most simple and common rules of law are difficult of application, and that it often requires careful study, nice discrimination and a well instructed mind to perceive the distinctions on which the decision of cases depends. Certainly they cannot be apprehended in the brief time allotted to the deliberations of the jury room. Indeed, we know of no method that could be adopted which would more effectually tend to confuse the minds of jurors and to mislead them in the proper discharge of their duty, than to permit them to read or refer to law books during their consultations for the purpose of ascertaining the rules of law which were applicable to the cases which are submitted for their determination. Nor are we able to see that there would be any difference in this respect whether the books which they were allowed to read were treatises, or books of reports, or volumes of statutes. The latter are often quite as difficult to interpret and apply as are the rules and principles contained in the former.

In the case before us, the provisions of the statutes on which the rights of the parties depended are by no means clear or easy of application. They have already been before us for construction on questions which arose between these same parties; *Nary* v. *Merrill*, 8 Allen, 451; and it is apparent that in their application to the facts in controversy their exposition was not free from difficulty, or such that jurors would be likely to arrive at it correctly by a reference to the statutes themselves. We cannot know that, after reading these in their room, they followed the instructions which the court had given them as to the true interpretation and application of the provisions in question. On the contrary, from the fact that they sent for the volume, the inference is rather that they did not intend to follow these instructions, or that they had forgotten them and sought to act on such aid as they might obtain from reading the clauses on which the decision of the case turned.

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On the ground that there is reason to believe that the verdict may have been founded on erroneous views of the law, and that the action of the court, if sanctioned by us, would be a bad precedent, we are of opinion that there must be a new trial.

*Exceptions sustained.*

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JAMES KIDNEY *vs.* WILLIAM RICHARDS.

If a case is submitted in the superior court to a jury under instructions to which no exception is taken, and afterwards in overruling a motion for a new trial the court considers and holds the law applicable to the case to be as ruled at the trial, no ground of exception lies open.

WRIT OF ENTRY to recover a parcel of land in Richmond.

At the trial in the superior court, before *Rockwell*, J., the demandant claimed title to the premises under a deed from Levi Austin to Joseph Kinney, dated August 21st 1844, describing the land by courses and distances, and the only question was as to a narrow strip along the southern line of the land, which the tenant contended was not covered by said deed. It appeared that, at the time when the deed was given, men were called in who set stakes to indicate the southern bounds of the land conveyed. The judge instructed the jury that in construing the deed courses and distances need not be strictly followed, if bounds were established at the time of the sale of the land, and that the deed should be construed to include the whole premises demanded, if by the evidence the location of the bounds could now be clearly ascertained. No exception to this ruling was taken. The jury returned a verdict for the tenant; and the demandant filed a motion for a new trial on the ground that the verdict was against the evidence, the weight of evidence, and the law. The judge, considering and holding the law applicable to the case to be as ruled at the trial, overruled the motion, and the demandant alleged exceptions.

*A. J. Waterman*, for the demandant.

*M. Wilcox*, for the tenant.

GRAY, J. The instructions given to the jury at the trial were,

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to say the least, sufficiently favorable to the demandant; he took no exception to them at the trial, and now admits their correctness. He did not ask the court, either at the trial or upon the subsequent hearing, to rule that on the facts stated by the witnesses, if satisfactorily proved, he was entitled to recover. His motion for a new trial was made upon two grounds: 1st, that the verdict was against evidence; 2d, that it was against law. The only point of law which appears to have been ruled upon the hearing of a motion for a new trial was the same previously stated in the instructions to the jury. A rule of law laid down at the trial without exception cannot be excepted to upon a motion for a new trial. The question whether the evidence warranted the verdict is not before us. In short, the demandant shows no error prejudicial to him in the rulings or instructions of the judge in matter of law, and this court cannot upon exceptions revise the finding of the jury or of the presiding judge in the court below on questions of fact.

*Exceptions overruled.*

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DAVID HUMPHREY & others *vs.* BERKSHIRE WOOLLEN COMPANY.

Under Gen. Sts. *c.* 114, §§ 3, 7, 8, and *c.* 149, § 4, the superior court has exclusive jurisdiction of complaints for flowing land, and such a complaint cannot be removed to this court by the defendant on affidavit.

COMPLAINT for flowing land, commenced originally in the superior court, and removed to this court on affidavit of the defendants' agent that the defendants have a substantial defence on the merits and intend to bring the cause to trial, and that the amount in controversy exceeds one thousand dollars. The complainant moved that it be sent back to the superior court, for want of jurisdiction in this court to try it; and this question was reserved by *Chapman*, J. for the determination of the whole court.

*H. L. Dawes*, (*M. Wilcox* with him,) for the complainant.

*I. Sumner & T. P. Pingree, Jr.*, for the defendants.

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BIGELOW, C. J. We are of opinion that this court has no jurisdiction of this case in the present state of the proceedings. By Gen. Sts. *c.* 114, § 3, it is expressly provided that the superior court shall have exclusive original jurisdiction of complaints for flowing land. This clear and unequivocal enactment deprives all other courts of any authority to take cognizance of such cases, except so far as it is qualified by other provisions on the same subject. It certainly needs no argument to prove that giving to one court exclusive jurisdiction of a class of actions *ex vi termini* shuts out all others from exercising any power or authority to hear and determine them in any stage of proceeding prior to final judgment. The provision above cited is found in that chapter of the General Statutes which confers jurisdiction upon and defines the powers of the superior court. The same provision is substantially repeated in the subsequent chapter of the statutes which relates to the support and regulation of mills. In providing a remedy for persons whose lands are overflowed or otherwise injured by the erection of a dam, it is enacted that they may obtain compensation therefor on "complaint before the superior court for the county where the land or any part thereof lies." Gen. Sts. *c.* 149, § 4. This being a special and peculiar remedy or course of proceeding, not according to the course of the common law, but existing only by statute, it can be pursued only in the manner and before the tribunal on which jurisdiction is expressly conferred by law. These provisions are qualified to a certain extent by a subsequent section in the chapter last cited, Gen. Sts. *c.* 149, § 12, by which it is enacted that either party to a complaint for flowing land may appeal, as in other civil actions. But this extends only to appeals on questions of law on matters apparent on the record, or the qualified appeal by exceptions, which are the only modes in which cases can be brought to this court by appeal which are originally and exclusively cognizable by the superior court. If anything were needful to fortify this construction, it is to be found in the remaining portion of the section, which provides that "if the judgment of the supreme judicial court is in favor of the complainant, the cause shall be remitted, and the court shall

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proceed therein in like manner as if the judgment had been rendered in that court;" clearly implying that the jurisdiction of this court is to be confined strictly to the questions of law arising on the appeal, and that all other proceedings are to be had in the superior court.

But it is contended, on the part of the defendants, that the provisions contained in Gen. Sts. *c.* 114, §§ 7 and 8, by which actions may be removed from the superior court to this court by consent of parties or on affidavit by the defendant, are sufficiently broad and comprehensive to embrace complaints for flowing land; and that this action, having been so removed on affidavit duly made by the defendants, is rightfully here, and properly within the cognizance of this court. Taking the language of these sections by themselves, this position might perhaps be supported; but they are not to be so interpreted. They are to be construed with reference to and in connection with other provisions which immediately precede them, and in conformity to the manifest scope and purpose of the chapter of the General Statutes of which they form a part. So considered and interpreted, it is clear that these sections are intended to be applied only to cases in which the supreme judicial court and superior court have concurrent jurisdiction, and to provide a method by which such cases may be transferred to this court which were originally brought by the plaintiff in the superior court, either by the affidavit of the defendant or by the mutual consent of parties. But these provisions were not intended to have a broader application; certainly not to enable a defendant or to authorize parties by mutual agreement to remove to this court cases of which in express terms the superior court had exclusive jurisdiction. Indeed, it would be little short of an absurdity to suppose that the legislature intended to give parties a right to bring before this court a class of actions which they had studiously provided should be exclusively cognizable by the lower court. So construed as to lead to such a result, the provisions of different clauses of the same statute would be repugnant; a conclusion not to be arrived at where, as in the case at bar, there is a reasonable and satisfactory interpretation which renders both provisions harmonious and consistent.

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Besides; the interpretation for which the defendants contend would put the parties to a proceeding like the one at bar on an unequal footing, in the exercise of the important right of selecting the tribunal before which the case should be tried. Under the provisions of § 3, which give the superior court exclusive jurisdiction of complaints for flowing land, there can be no doubt that the plaintiff would be compelled to bring his suit before that court. He could not, if he would, commence it in this court. But if the construction urged by the counsel for the defendants is correct, a defendant would have the privilege of removing the case by affidavit to this court. Such a result could not have been contemplated by the legislature. It cannot be supposed that they intended to give the defendant a right, at his election, to transfer the case to this court, when they had by express enactment deprived the plaintiff of the correlative right of instituting his action originally here.

The case of *Commonwealth* v. *O'Connell*, 8 Gray, 464, cited by the defendants' counsel, has no bearing on the question in contention here. That case only decided that the legislature by a long series of enactments in relation to police courts had indicated an intention to restrict the ordinary signification of the phrase "exclusive jurisdiction," so that it should not be interpreted to take away the power of justices of the peace to receive complaints and issue warrants returnable before such courts. But there has been no such course of legislation in regard to the subject matter in controversy here. On the contrary, the only previous enactment on the subject matter of the exclusive jurisdiction of complaints for flowing land, in connection with the right of defendants to remove actions by affidavit to this court, is to be found in *St.* 1840, *c.* 87, the provisions of which are very similar to those contained in Gen. Sts. *c.* 114, §§ 4, 7, 8. The practical construction of that act, and its judicial interpretation, so far as any has been given, were in conformity to that hereinbefore stated. See *Northampton Paper Mills* v. *Ames*, 6 Met. 422.

*Action dismissed from this court, and remitted to the superior court.*

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LEONARD OLMSTEAD *vs.* JOHN G. MANSIR.

In an action to recover for the conversion of personal property, the admissions of the plaintiff as to the bargain under which he claimed to hold it are not to be excluded, when nothing further is shown but the existence of a written bill of parcels or schedule enumerating the articles purchased, and it does not appear that such bill of parcels was signed by the vendor.

TORT for the conversion of a sleigh.

At the trial in the superior court, before *Rockwell*, J., "the defendant testified that the plaintiff told him he had purchased the sleigh and other property of H. H. Holley. The plaintiff showed him a paper bill of sale or schedule, enumerating the articles purchased. The defendant did not know as there was any signature to the paper or schedule. Objection was then made to any further evidence as to the sale, and that what had been stated in evidence to it should be stricken out. The objection was overruled, and the plaintiff excepted;" the verdict being for the defendant.

The above is all that the bill of exceptions showed concerning the matter decided in this case, or how the question arose or became material.

*H. W. Bishop*, for the plaintiff.

*A. J. Fargo*, for the defendant, was not called upon.

BY THE COURT. It does not appear that the paper writing referred to in the exceptions was ever completed by the parties as a contract of sale, under which the plaintiff bought the property in question; but if it had so appeared, it seems to have been only a bill of parcels, and not such a written contract as would exclude parol evidence of the terms of the bargain. There is, therefore, no ground for the only exception on which the plaintiff now insists. *Exceptions overruled.*

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EDWARD P. WOODWORTH *vs.* MARIA COMSTOCK.

A woman who has never been married and has no children cannot hold an estate of homestead under *St.* 1855, *c.* 238.

WRIT OF ENTRY to recover possession of land upon which the demandant had levied an execution against the tenant.

At the trial in the superior court, before *Rockwell*, J., the tenant offered evidence tending to prove that the land was conveyed to her on the 18th of April 1855, and that she lived upon it with her mother; and she contended that by reason thereof she was entitled to hold it as a homestead, and the judge so ruled, and reported the case for the determination of this court

*I. Sumner*, for the demandant.

*H. W. Bishop*, for the tenant.

DEWEY, J. The exemption of a homestead estate, to the value of $800, from a levy of execution thereon for the debt of the owner, is a right created exclusively by statute, and must depend upon the peculiar phraseology of the statutes giving such exemption. The present claim to hold such an estate arises under *St.* 1855, *c.* 238, § 1, by which it was enacted that "there shall be exempted, to the value of eight hundred dollars, the homestead farm or the lot and buildings thereon, occupied as a residence and owned by the debtor, . . . . he being a householder and having a family." Looking at the provisions of this statute, it would seem quite clear that they do not embrace the case of an unmarried woman having no children.

Whether the statute gives such estate of homestead as an original right to a widow having children, in case she was the owner of a lot and buildings occupied by her at the time this statute took effect, it is unnecessary to decide in the present case.

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## Thomas D. Thompson *vs.* Edward H. Purcell.

If labor has been performed and materials furnished by A., in the erection of a building for B., who has executed a written promise to pay a certain sum therefor, "provided the roof under and around the belfry deck does not leak, and provided further that the plastering on the church said A. built for said B. proves not to be injured by the frost," the acceptance of such written promise will not prevent a recovery for the value of the labor, on a *quantum meruit*.

Contract. The declaration contained a count upon a written contract for erecting a church, one upon a *quantum meruit* for labor performed and materials furnished in erecting the same church, and a third upon the following written contract: "$408. Hinsdale Depot, Jan. 5th 1860. On the first day of May next, I promise to pay to the order of Thomas D. Thompson, at the Pittsfield Bank, four hundred and eight dollars, value received, and interest, provided the roof under and around the belfry deck does not leak, and provided further that the plastering on the church said Thompson built for said Purcell in Hinsdale proves not to be injured by the frost. Edward H. Purcell."

At the trial in the superior court, before *Vose*, J., there was evidence tending to prove that, on January 5th 1860, after the plaintiff had finished work upon the church, the parties met for a settlement, and could not then determine whether the work had been done according to the specifications of a written contract under which it had been performed, and the defendant feared there might be some leak, and wanted some security, and the whole matter under the contract was closed by the defendant's giving his note for $400, which was afterwards paid, and the above written contract, all other payments under the building contract having been made. The plaintiff in this action only sought by his several counts to recover the said sum of $408 and interest thereon. It appeared that after the 1st of Ma 1860 the plaintiff demanded of the defendant payment of this amount, which the defendant refused on the ground that the conditions named in the written contract had not been complied with, and the plaintiff thereupon endeavored to remedy the

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alleged defects. The plaintiff conceded that he had not completely performed the requirements of the contract, there being some leaks in the tower which he had not succeeded in remedying. The defendant entered into the occupation of the church in December 1859, and has since continued to occupy it. There was conflicting evidence as to what would be the expense of remedying the defects.

The defendant requested the court to instruct the jury that if the parties met in January 1860, and settled everything between them in reference to the contract for erecting the church, and the result of that settlement was the giving of the writing declared on, then the plaintiff's remedy is on that paper alone, and not upon the original contract or upon a *quantum meruit*. But the judge declined so to rule, and instructed the jury that upon the foregoing facts and evidence the taking by the plaintiff of the written promise did not preclude him from recovering upon a *quantum meruit*, for any balance that might be due to him.

The jury returned a verdict for the plaintiff, with $440.88 damages; and the defendant alleged exceptions.

*T. P. Pingree, Jr.*, for the defendant.

*S. W. Bowerman*, for the plaintiff.

Bigelow, C. J. If the contract bearing date January 5th 1860, set forth in the third count of the declaration, had been an ordinary agreement for the payment of money growing out of a loan, or sale of merchandise, or purchase of land, or other similar transaction, the interpretation for which the defendant contends would have been the true one. It would have been a promise dependent for its fulfilment on the performance of a condition by the promisee. The failure to comply with the condition would have been a decisive answer to the plaintiff's right to recover. But we think the contract in question is to be interpreted in reference to the subject matter to which it relates, and out of which it arose. It was given on the settlement of the amount due on a building contract. By the well settled rule of law in this commonwealth, when work has been done and materials furnished in the erection of a building on the land of another, under a special contract, for which money is agreed to

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be paid only on the fulfilment of certain stipulations or conditions, a party may recover such sums as the materials and labor are worth, although the special stipulations and conditions of the contract have not been complied with. *Smith* v. *First Cong. Meeting-house in Lowell*, 8 Pick. 178. *Bassett* v. *Sanborn* 9 Cush. 58. *Gleason* v. *Smith*, Ib. 484.

The agreement of January 5th 1860 must be interpreted with reference to this rule of law. At the time the settlement took place and this new agreement was entered into, the plaintiff would have had a right to recover the amount due to him for labor and materials, deducting a proper sum for the deficiencies in doing the work according to the contract. It is not reasonable to suppose that the plaintiff intended to relinquish this right, and to surrender the whole amount due to him for his labor and materials, because there were slight imperfections in the building which could be made good for a much smaller sum. The more reasonable inference is that the new agreement was designed only as evidence of a settlement by which the sum due for the building when completed according to the contract was ascertained and fixed; and that the condition was inserted only to show that the building was not accepted as having been finished according to the contract, and that the plaintiff was bound to make the specified defects good, notwithstanding the express promise to pay a certain sum of money. It was not a conditional promise, strictly speaking, or an accord and satisfaction. This was the view of the interpretation of the contract which was taken at the trial. The court correctly ruled that the plaintiff was not precluded from recovering on a *quantum meruit*.

*Exceptions overruled.*

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HENRY CHAMBERLAIN *vs.* JACOB J. WALKER.

If one partner advances money for the benefit of another, to relieve him from his liability for the debts of the firm, and takes his note therefor, this is to be regarded as a private transaction, and the note may be enforced without reference to the state of the partnership accounts.

WRIT OF ENTRY to foreclose a mortgage. The case was referred to an auditor, whose report was agreed in the superior court to be taken as an agreed statement of facts, and judgment was rendered thereon for the plaintiff. The defendant appealed to this court. The facts are sufficiently stated in the opinion.

*H. W. Bishop*, for the defendant.

*S. W. Bowerman*, for the plaintiff.

CHAPMAN, J. By the report of the auditor, which the parties have agreed to adopt as a statement of facts, it appears that the mortgage and note were made and delivered to the mortgagee, John Chamberlain, and that after his decease they were sold and assigned by his executors to the plaintiff. This establishes a *prima facie* case for the plaintiff.

The defendant relies upon the fact that when the mortgage and note were given he and John Chamberlain were copartners with the plaintiff and several other persons, by the name of the Dalton Woollen Company, and that the note was a partnership transaction; that therefore the plaintiff cannot maintain this action, but must resort to a bill in equity, and can recover only what may appear to be due to him as a final balance from the firm.

But it appears that the firm was subject to certain liabilities for which judgments had been recovered and executions issued; and upon these executions the defendant and several other members of the firm had been committed to jail; that John Chamberlain agreed to procure the release of the defendant and others and pay the executions, and this agreement was the consideration for which, so far as the defendant was concerned, he gave the note and mortgage in controversy. Other members gave

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security for other amounts. It does not appear that this consideration has failed. When one member of a firm advances money for the benefit of another, to relieve him from his liability for the debts of the firm, and takes his note therefor, it is to be regarded as a private transaction between the two members, and not as a partnership transaction. The other members are not liable to pay the note, and have nothing to do with it. The right of the payee to collect it does not depend upon the state of the partnership affairs, nor is it necessary to investigate them in order to determine whether the note is due. The assignee has the same rights as the assignor, and the fact that he is a member of the firm does not affect his rights.

Upon the facts as stated in the case, the plaintiff is entitled to a conditional judgment.

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WILLIAM E. SEDGWICK *vs.* HEMAN LAFLIN & another.

A mortgage of land to an individual, "his successors and assigns forever," conveys only a life estate, although it contains a power of sale, which has never been executed, authorizing the mortgagee, in case of default in the performance of the condition, to sell the land and execute a conveyance thereof in fee simple.

GRAY, J. The plaintiff, as executor of the will of Elizabeth D. Sedgwick, brings this writ of entry to foreclose a mortgage of land in this county, made on the 9th of February 1856 by the defendant George C. Crosby to the testatrix, "and to her successors and assigns forever," with like words in the habendum, but without the word "heirs" in either clause.

There is no better settled or more familiar rule of the common law than that the word "heirs" is necessary to create an estate of inheritance by a conveyance of land to the grantee's own use and not in trust. Littleton and Coke declare that the very words "successors and assigns," used in the instrument before us, are not sufficient to make an estate of inheritance. Litt. § 1. Co. Litt. 1 *a*, 8 *b*. And Lord Holt said, "The law appoints that let the intent of the parties be ever so fully expressed and

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manifested in grants, without the word 'heirs' a fee shall not pass." *Bridgewater* v. *Bolton*, 6 Mod. 109; *S. C.* Holt, 281.

Long before the time of Lord Holt, the rule was expressly adopted in Massachusetts. In the earliest years of the colony a loose practice in this respect had grown up. But in May 1651 the general court passed the following statute, and took unusual precautions for making it generally known, as appears in the law itself: "Whereas, through unskilfulness of some that make deeds and conveyances of lands and houses, the word 'heir' is oftentimes omitted when an estate of inheritance is intended to be passed by the parties, whereupon questions and suits at law are apt to arise; for prevention whereof for the time to come, this court ordereth, that in all deeds and conveyances of houses and lands in this jurisdiction wherein an estate of inheritance is to pass, it shall be expressed in these words, or to the like effect, viz. To have and to hold the said house or lands, respectively, to the party or grantee, his heirs and assigns, for ever." "Provided, that this law shall not include former deeds or conveyances, but to leave them in the same condition as they were in, or shall be in, before this law taketh effect, which shall be at the end of the next session of this court [the last of October]; provided also, that this law shall not extend to houses or lands given by will or testament, or to any land granted, or to be granted, by the freemen of a town; and this law being of concernment to be understood of every man, there shall be special care for the publication thereof; and to that end it shall be distinctly read by the constable of each town in their next town meeting after the end of the fifth month next [July]; also a copy thereof shall be set upon the door of their meeting-house, to continue fourteen days; and the grand jury shall inquire and present such as shall neglect the publication thereof, according to this order." 4 Mass. Col. Rec. pt. 1, 39. The substance of this provision was inserted in each successive revision of the laws of the colony; and so the law of Massachusetts has continued to this day as to all deeds, except conveyances upon such trusts as in their nature require an estate in fee to support them. Anc. Chart. 85. 4 Dane Ab. 61, 503, 504. *Gould* v. *Lamb*, 11 Met. 84. *King* v. *Parker*, 9 Cush. 79 81.

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The mortgage in suit indeed declares that in case of default of payment of principal or interest, it shall be lawful for the mortgagee, "her successors or assigns, to enter into and upon all and singular the premises hereby granted or intended so to be, and to sell and dispose of the same at public auction, according to the act in such case made and provided," and as the attorney of the mortgagor convey the same in fee simple, and out of the money arising from such sale to retain the amount of the mortgage and expenses, and pay the surplus, if any, to the mortgagor. But this provision cannot enlarge the estate granted, for several reasons. It creates no trust of such nature and duration as to require an estate in fee to support it; indeed no trust whatever, which either the mortgagor or any third person is interested to have performed; but a mere power, to be executed or not at the option of the mortgagee, in which the mortgagor has no other interest than in being entitled to an account in case the mortgagee shall see fit to avail himself of it. It is clearly a power, and not a trust, within the elementary definition of Lord Chief Justice Wilmot, approved by Sir Edward Sugden. "Powers are never imperative; they leave the act to be done at the will of the party to whom they are given. Trusts are always imperative, and are obligatory upon the conscience of the party intrusted." *Attorney General* v. *Downing*, Wilmot, 23. 2 Sugden on Powers, (7th ed.) 158. A power to dispose of land in fee may be and often is given to a tenant for life. This power, if it could be executed at all according to the provisions of this mortgage, and had been executed, might perhaps have transmitted an estate in fee in the land; but not having been executed, that point does not arise. It is, to say the least, very doubtful whether this power is sufficiently definite to be executed at all; for it only authorizes a sale "at public auction, according to the act in such case made and provided;" and our statutes contain no regulations on the subject. *Sts.* 1854, *c.* 377; 1857, *c.* 229. Gen. Sts. *c.* 140, §§ 38–44.

The defects in this mortgage seem to have been occasioned by the use of a form adapted to the law of New York, where the mortgagee resided and the instrument was perhaps made

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and the case illustrates the justice of Chancellor Kent's apprehension of the difficulties to be occasioned by the statute of that state, altering the rule of the common law which required words of inheritance to pass an estate in fee. 4 Kent Com. (6th ed.) 8, *note*. It is hardly necessary to add that by the law of both states the construction of a mortgage is to be governed by the law of that state in which the land lies. *Cutter* v. *Davenport*, 1 Pick. 86. *Hosford* v. *Nichols*, 1 Paige, 226.

The provision of the Gen. Sts. *c.* 96, § 9, that a mortgage of real estate, not foreclosed at the death of the mortgagee, shall go to the executor and not to the heir, and may be foreclosed at the suit of the executor, does not extend or revive a mortgage which by its terms expires with the life of the mortgagee. As the estate granted by this mortgage terminated with the mortgagee's life, the plaintiff has no title on which to maintain this writ of entry. *Exceptions overruled.*

*B. Palmer*, for the plaintiff.

*I. Sumner*, for the defendants.

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WILLIAM W. LANGDON *vs.* ORSON L. DOUD.

If a debtor who lives in this commonwealth, being about to go away, represents to a creditor that he does not intend to return, but without any purpose of deceiving the creditor and inducing the belief that he intends to take up a permanent residence in another state, when in fact he has no such purpose, and he subsequently returns and is sued after the lapse of six years, he is not estopped by the above representation from setting up in defence the statute of limitations, and showing in support of this defence that he never acquired a domicil elsewhere.

CONTRACT upon a promissory note, signed by the defendant, dated September 9, 1854. The writ was dated May 20, 1862. The defence was the statute of limitations.

At the second trial in the superior court, before *Vose*, J., after the decision reported in 6 Allen, 423, the plaintiff introduced evidence to show that in March 1855 the defendant, who then lived in Monterey, told the plaintiff that he was going to California in about a month from that time, never to return, and



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would within that month pay the note; and that he left for California the next day, and remained there until the autumn of 1858, when he returned to Monterey. The plaintiff also offered evidence to show that he was induced by the defendant's statements to believe that the defendant never would return to Massachusetts, and therefore did not bring any suit in this commonwealth in his absence, believing that the defendant intended to reside in California, and that, if he should happen to return here, the time of his absence would be deducted; but this evidence was excluded. The evidence was conflicting as to the defendant's purpose in going to California, and his intention to return.

The judge instructed the jury that, in order that the time of the defendant's absence from Massachusetts should not be taken as a part of the time limited for the commencement of this action, he must have been absent from and residing out of the Commonwealth under such circumstances that he ceased to have any domicil here; that, it being conceded that the defendant had such a domicil in Monterey when he left for California, if he left this commonwealth intending not to return, and went to California and took up his actual residence there, with the intention of remaining there permanently, then his domicil here ceased, and the time of his absence is to be deducted; but if he left for California intending to return, and not to abandon his home or permanent residence here, or if he left, intending not to return, but did not take up an actual residence in California, with the intention of making a permanent residence or home there, then his domicil remained in Massachusetts, and the time of his absence should not be deducted.

The plaintiff asked the court to rule that if the defendant stated to the plaintiff that he was going to California and was never coming back, and the plaintiff believed such statement and acted upon it to his injury, in forbearing to bring a suit or obtain a judgment against the defendant in his absence, then the defendant would be estopped to deny that he did not intend to return to Massachusetts; or if the defendant, in regard to leaving Massachusetts and going to California, so stated to the

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plaintiff or so conducted toward him willingly and wittingly as to lead him into the belief that the defendant would become and remain a resident in California, whereby the plaintiff was misled or might be misled to his injury, then the defendant would be estopped from making denial in regard to his said statements or conduct; or if the defendant's statements and conduct in regard to going to California were intended to deceive the plaintiff, then he would also be so estopped. The judge declined to give any of the above instructions, but submitted the following questions to the jury: 1. Did Doud, before he left for California, represent to the plaintiff that he did not intend to return to Monterey to reside? 2. If he made such representation, did he do so for the purpose of deceiving the plaintiff and inducing him to believe that he intended to take up a permanent residence in California, when in fact he had no such purpose? To the first question the jury answered, "He did;" and to the second, "No."

The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

*I. Sumner & J. Dewey, Jr.*, for the plaintiff, cited *Pickard* v. *Sears*, 6 Ad. & El. 469; *Freeman* v. *Cooke*, 2 Exch. 654, 663; *Sheffield, &c. Railway* v. *Woodcock*, 7 M. & W. 582; *Wells* v. *Pierce*, 7 Foster, (N. H.) 503; *Simons* v. *Steele*, 36 N. H. 73, 79; *Kelly* v. *Eichman*, 5 Whart. 446.

*A. J. Fargo*, for the defendant.

Bigelow, C. J. The difficulty with the plaintiff's case is, that the facts disclosed at the trial do not warrant the application of the principle of law on which he relies in support of his exceptions. No doubt can be entertained that the rule of law is perfectly well settled, that when a party wilfully makes a representation of a fact to another, and thereby induces him, acting on the belief that such representation is true, to alter his position to his own prejudice, the former is precluded from averring against the latter that his representations were not true, in a controversy between them relating to the subject matter concerning which such representation was originally made. Such a representation is sometimes, though not very accurately, said

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to operate as an estoppel; but its effect is rather to shut out a party from offering evidence in a court of justice, contrary to his previous statements. *Howard* v. *Hudson*, 2 El. & Bl. 1. *Audenried* v. *Betteley*, 5 Allen, 382. *Plumer* v. *Lord*, 9 Allen, 455.

Without undertaking to define the nature or kind of representations which will thus operate to preclude a party, we think it very clear that the statement proved at the trial of this case, which the plaintiff seeks to set up for the purpose of excluding the defence of the statute of limitations, does not come within the rule. In the first place, it does not appear that the representation made by the defendant of his intention to abandon his domicil in Massachusetts, and to take up his residence in California, was not perfectly true at the time it was made, and that he did not make it in entire good faith, and with the purpose of carrying it into execution. This however may not be a decisive consideration. But, in the next place, it was a representation only of a present intention or purpose. It was not a statement of a fact or state of things actually existing, or past and executed, on which a party might reasonably rely as fixed and certain, and by which he might properly be guided in his conduct, and induced to change his position in the manner alleged by the plaintiff. The intent of a party, however positive and fixed, concerning his future action, is necessarily uncertain as to its fulfilment, and must depend on contingencies and be subject to be changed and modified by subsequent events and circumstances. Especially is this true in regard to the place of one's domicil. On a representation concerning such a matter no person would have a right to rely, or to regulate his action in relation to any subject in which his interest was involved as upon a fixed, certain and definite fact or state of things, permanent in its nature and not liable to change. A person cannot be bound, by any rule of morality or good faith, not to change his intention, nor can he be precluded from showing such change, merely because he has previously represented that his intentions were once different from those which he eventually executed. The doctrine of estoppel or exclusion of evidence on the ground that it is contrary to a previous statement of a party does not

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apply to such a representation. The reason on which the doctrine rests is, that it would operate as a fraud if a party was allowed to aver and prove a fact to be contrary to that which he had previously stated to another for the purpose of inducing him to act and to alter his condition, to his prejudice, on the faith of such previous statement. But the reason wholly fails when the representation relates only to a present intention or purpose of a party, because, being in its nature uncertain and liable to change, it could not properly form a basis or inducement upon which a party could reasonably adopt any fixed and permanent course of action.

There is another decisive objection to the application of the rule in question to the case at bar. The jury have found that the alleged statement or representation made by the defendant to the plaintiff was not made for the purpose of deceiving the plaintiff, or inducing him to believe that he intended to take up a permanent residence in another state. This special finding seems to be in accordance with the evidence as stated in the exceptions, and the nature of the statement itself. There is wanting, therefore, an essential element, without which the rule contended for by the plaintiff cannot be applied in any case; that is, that the defendant intended, when he made the alleged representation, that the plaintiff should act on the faith of it. That this is a material fact to be established, in order to justify the application of the doctrine of exclusion or estoppel, is well stated in the case already cited, *Howard* v. *Hudson*, *ubi supra*, and in *Freeman* v. *Cooke*, 2 Exch. 654.

Upon these grounds, we are of opinion that there was no error in the instructions given to the jury.

*Exceptions overruled.*

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LAWSON D. BIDWELL *vs.* ALANSON ROGERS.

A written promise to pay a debt which is barred by the statute of limitations "as soon as I can" will not sustain an action thereon without proof of the ability of the promisor.

CONTRACT upon a promissory note. The defence was the statute of limitations. At the trial in the superior court, before *Rockwell*, J., the note was produced and bore date more than six years before the commencement of the action, and the plaintiff offered in evidence a letter dated in March 1864, purporting to be signed by the defendant, which the plaintiff testified by deposition that he had received in reply to a letter sent by him to the defendant, though he was unable to state that it was in the defendant's handwriting. This letter contained the following language: "I do not know when I can come and see you, but I will try to as soon as I can, and will pay you as soon as I can." No further evidence being offered, the judge directed a verdict for the defendant, which was rendered, and the plaintiff alleged exceptions.

*H. W. Bishop*, for the plaintiff.

*A. J. Fargo*, for the defendant.

CHAPMAN, J. If the letter attached to the deposition had been proved, it would not have been sufficient to avoid the operation of the statute of limitations. It contains no reference to the note, or absolute promise to pay the plaintiff what is due to him; but a promise to come and see him when he can, and to pay him when he can; and no proof was offered of his ability to pay. *Tanner* v. *Smart*, 6 B. & C. 603. *Gibson* v. *Grosvenor* 4 Gray, 606, and cases cited. Angell on Limitations, § 235. See also *Proctor* v. *Sears*, 4 Allen, 95.

*Exceptions overruled.*

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## Henry W. Richardson *vs.* John C. Wolcott & another.

On a *scire facias* to obtain a new execution, when the levy of the first execution has proved ineffectual, no matters are properly open in defence which existed prior to the rendition of the judgment.

If such levy was made upon the property of only one of two judgment debtors, he is bound by a judgment, deciding the levy to be ineffectual, in a petition for partition to which the other judgment debtor was not a party.

If a writ has been amended by striking out the name of one of the plaintiffs, on terms which have been complied with, the defendant at the termination of the case is not entitled to tax costs against the plaintiff whose name was thus stricken out.

Scire facias to obtain a new execution against John C. Wolcott and Norman Cotton, upon a judgment recovered against them in March 1858 by the plaintiff and Ira Richardson, since deceased; the first execution having been levied by setting off by metes and bounds certain land as the estate of Wolcott, of which he owned an undivided share as tenant in common.

This writ was originally brought in the superior court in the names of the plaintiff and Esther L. Richardson jointly, as the executors of the estate of Ira Richardson; the plaintiff also claiming as surviving partner of the late firm of Ira Richardson & Son. At February term 1864 the writ was amended, under leave of court, by striking out the name of Esther as a plaintiff, and making such other changes as were necessary to make it a writ by the plaintiff alone, as surviving partner. This amendment was allowed upon payment of a double term fee.

On a petition for partition to which Cotton was not a party, the levy of the execution was adjudged to be invalid. The defendants, at the trial in the superior court, before *Ames*, J., without a jury, objected to the admission of the evidence, but their objection was overruled. They also offered to show that the judgment was improperly obtained against them, but the evidence was excluded.

The judge found for the plaintiff, and the defendants alleged exceptions. A question of costs subsequently arose, which is stated in the opinion.

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*J. C. Wolcott*, for the defendants.

*H. L. Dawes*, (*F. O. Sayles* with him,) for the plaintiff.

DEWEY, J. 1. Upon this application for a new execution upon a judgment recovered against the defendants, after a levy of the original execution upon real estate, which levy it is alleged has failed to pass any title to the judgment creditor by reason of informality in the mode of making the same, no matters are properly open as objections to such judgment which existed prior to obtaining the same. *Sigourney* v. *Stockwell*, 4 Met. 518. *Thatcher* v. *Gammon*, 12 Mass. 267. Ample provision is made by law for granting a review of such judgment, where the same was obtained by fraud, accident or mistake, and a writ of error when a proper case therefor exists. No such application having been made, and the defendants having hitherto acquiesced in the judgment and permitted a levy of the execution which issued upon the same, they cannot upon this *scire facias* impeach the judgment for any of the causes set forth in their answer.

2. The evidence offered by the plaintiff to show that the levy was invalid and that no title passed thereby was proper and sufficient, it being shown to have been a levy by metes and bounds upon Wolcott's interest in certain real estate held by him as one of several tenants in common. The return of the officer making the levy perhaps sufficiently shows this, but the plaintiff produced further evidence to show that his levy had been, in a petition for partition, held by the judgment of court to be invalid. The fact that Cotton, one of the judgment debtors, was not a party to that proceeding, the levy having been made on Wolcott's interest, does not render that evidence incompetent. The superior court properly ruled in favor of the plaintiff

3. In the above case, an appeal was taken from the taxation of costs by the clerk of the court, made under the order of the court. The case was this: The present plaintiff had improvidently joined as a plaintiff Esther L. Richardson, his co-executor of the will of his co-creditor in the original judgment. At February term 1864 the plaintiff moved for leave to amend the writ of *scire facias* by striking out her name as plaintiff. The amendment was granted by the court upon the terms that the plaintiff

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pay a double term fee to the defendants, which was duly paid. At October term 1864, after the further hearing of the case as amended, and after judgment had been ordered for the plaintiff, the defendants moved for costs to be taxed against Esther L. Richardson, whose name had been stricken from the writ by leave of the court, at a previous term, and upon terms which had been complied with. This motion was allowed.

In our opinion such costs should not be taxed. This was an amendment authorized by the practice act, Gen. Sts. c. 129, § 41. Such amendments "when allowed are to be on such terms as are just and reasonable." The sum originally ordered by the court as the proper sum to be paid was all the costs to which the defendants were entitled. Upon making the amendment, the suit proceeded to trial, and the defendants failed to maintain their defence and are entitled to no costs.

The appeal from the taxation of these costs is sustained.

*Exceptions overruled — taxation of costs reversed.*

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MARSHALL BRACE *vs.* ALLEN S. YALE.

The owner of a mill, situated upon a small stream, by erecting a reservoir dam a short distance above, and exercising control of the water of the stream, under claim of right, by means of gates built in the reservoir dam, drawing more or less than the natural flow of the stream, as he has occasion, for more than twenty years uninterruptedly, may acquire a right so to use the water, as against the intermediate owners of the land over which the stream passes; and may maintain an action to recover damages against such an intermediate owner, who substantially interferes with this right.

TORT to recover damages for interrupting the flow of water to the plaintiff's mill in Stockbridge.

It was agreed, in the superior court, that the plaintiff was owner of an ancient mill in Stockbridge, used by him and those under whom he claims for upwards of sixty years as a saw-mill. About one hundred rods above the milldam a reservoir dam was situated, which has been maintained and used of right for upwards of forty-five years by the plaintiff and those under whom

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he claims, for supplying and operating the mill. About the year 1824 an oil-mill was built above the plaintiff's mill, with an overshot wheel, but the use of the water did not materially impede the flow of the stream to the plaintiff's mill. In 1851 the defendant became the owner of the oil-mill, and in 1854 built a new stone dam for it, higher than the former dam; he also became the owner of land upon the stream between the reservoir dam and the plaintiff's mill.

The plaintiff ordinarily used his reservoir by opening the gate in the morning, and it would require about two days' time to draw out the water therefrom, no water running in. If unobstructed by the intervening dam, the water would flow to the plaintiff's mill in about twenty minutes, but, owing to the defendant's dam and operations, the water was often kept back two hours and a half, in consequence of filling or refilling said dam. When the gate of the reservoir dam was closed, no water flowed in the stream below except such as leaked through or ran over the dam. In consequence of the defendant's operations, large quantities of water were discharged and wasted, because not wanted by the plaintiff. The defendant, when his pond was drawn down, by shutting his gates stopped the water from flowing to the plaintiff's mill until the defendant's pond was again filled; but the defendant used no more water than was advantageous for the working of his mill.

The plaintiff introduced evidence showing that hindrances in working his mill always occurred when the defendant worked his mill; the hindrance being some days half of the time.

It was agreed that if, upon the above facts, the plaintiff should be found entitled to recover, his damages should be assessed by a jury, or an assessor to be agreed upon. Judgment was rendered for the plaintiff, and the defendant appealed to this court.

*H. W. Bishop & M. Wilcox*, for the defendant. The defendant did no more than as a riparian owner, and owner of a mill privilege on his own land, he had a right to do. *Gould* v. *Boston Duck Co.* 13 Gray, 442. *Thurber* v. *Martin*, 2 Gray, 394. *Barrett* v. *Parsons*, 10 Cush, 367. *Dryden* v. *Jepherson*, 18 Pick. 385 *Bliss* v. *Rice*, 17 Pick. 23. *Whaler* v. *Ahl*, 29 Penn. State R. 98

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*Hartzall* v. *Sill*, 12 Penn. State R. 248. The plaintiff had acquired no easement in the defendant's land by grant, prescription or prior occupancy. The defendant is entitled to the improvement and advantages of the reservoir dam, if there be any, without paying compensation or damages. *Tourtellot* v. *Phelps*, 4 Gray, 370–374.

*I. Sumner*, for the plaintiff.

BIGELOW, C. J. The relative rights of different riparian proprietors, on the same stream or watercourse, to the use and enjoyment of the current, as it runs through their respective lands, for the purpose of driving mills and machinery, and for other hydraulic purposes, and the mode in which such use and enjoyment are to be regulated, so that the rights of adjoining proprietors may not be infringed, are fully stated and explained in *Gould* v. *Boston Duck Co.* 13 Gray, 442, and cases there cited. But this right or corporeal hereditament, which is embraced within or appertains to the ownership of the land over and through which a watercourse runs, is subject to the same incidents as all other interests in real property. It may be conveyed absolutely, or its use may be modified or restricted by grant; so, too, it may be lost or acquired either wholly or in part by an adverse user sufficiently long, exclusive and notorious, to furnish adequate grounds for the presumption of a grant. Angell on Watercourses, § 210. *Williams* v. *Nelson*, 23 Pick. 141. *Gould* v. *Boston Duck Co. ubi supra*, 451.

A careful consideration of the facts of this case leads to the conclusion that the plaintiff and those under whom he claims title have acquired, by long continued adverse user, the right to control and regulate the current of water between the dam at the mill owned and occupied by him and the reservoir dam situated one hundred rods above on the same stream, so far that he has acquired the right to retain the water in his reservoir, and prevent it from flowing in the natural channel, not only for the purpose of filling the reservoir, but also in order to gather therein a quantity of water which he can draw out at such times and in such quantities as may be convenient and necessary for the operating of his machinery in the mill situated on the lower dam, until all the water in the reservoir is exhausted.

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It is doubtless true that to establish the presumption of a grant of a right or servitude or easement over the land of another, or a modification or change of a corporeal hereditament thereto belonging, it must appear that the use or enjoyment has not been permissive only. It must be shown to have been under a claim of right, and inconsistent with or contrary to the interests and adverse to the title of the original owner of the land; that is, it must have been such a use that it is difficult or impossible to account for it except on the presumption of a grant from the original owner. If the use or enjoyment has been consistent with the existence of the right or title of the latter, no such presumption arises. Thus, the erection of a dam across a stream of water to raise a head for the purpose of driving wheels and machinery in a mill, and the cutting of canals, sluices and water ways to conduct, apply and discharge the water, although they may change in some degree the natural flow of the stream and cause a temporary obstruction to the passage of the water, yet, if they do not essentially affect the reasonable use of the current by riparian proprietors above and below for similar purposes, would not be inconsistent with the rights of such proprietors in the stream, and could not be deemed to confer any right or to take away any title or privilege. So, too, the erection of a dam for the purpose of forming a reservoir by flowing a large tract of land, by which the water would be obstructed only until such reservoir should be filled, and would then resume its natural flow, could not be deemed to be adverse or inconsistent with the rights of other proprietors below on the same stream. The obstruction in such case would be only slight and temporary, and would afford no ground for a presumption that any right of others to the use of the stream had been thereby impaired or lost. *Pitts* v. *Lancaster Mills*, 13 Met. 156.

But in the case at bar the plaintiff and his grantors have made a very different use of the water in the stream. The upper dam was not intended or used by them merely for the purpose of collecting water in a reservoir from which it was to flow in the natural channel *ut currere solebat*, occasioning no obstruction or hindrance, except such as might occur during the time

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necessary to fill the pond which the dam was designed to create. From the facts agreed it appears that the stream is a small one, and that the ordinary flow of the water, especially in dry seasons, is insufficient to operate the plaintiff's mill and machinery. The upper or reservoir dam was constructed for the purpose of holding back the water, so that the owner of the plaintiff's mill might draw it from the pond when it was necessary or convenient to carry the machinery in his mill. This was done by means of gates which were opened when the plaintiff's mill was in operation. These, when shut, prevented any water from passing down the natural channel, except that which leaked through, or, in seasons when the water in the stream was abundant, run over the dam. The amount of water drawn through the gates has depended on the quantity needful to carry the machinery which the plaintiff has had occasion to use in his mill; and the kind of work done in the mill has been regulated by the quantity of water in the reservoir. The plaintiff has been accustomed to raise and shut the gates of the reservoir according to the use which he may have desired or may have been able to make of the water in operating his machinery. The reservoir has thus been used to collect water for the immediate purpose of operating the plaintiff's mill, and the water in it has been drawn out, either partly or wholly, whenever it was required for the working of the machinery of the plaintiff. This mode of controlling and regulating the use of the water in the stream, as it essentially interrupted the original and natural flow of the water, and interfered materially with the right of the riparian owners of lands between the reservoir dam and the plaintiff's mill to appropriate and use the water, was in its nature adverse, and, having been continued under a claim of right for forty-five years and upwards, affords a conclusive presumption of a grant, from such intermediate owners to the plaintiff and his grantors, of such appropriation and use.

The only remaining question in this case is, whether the defendant has encroached on the prescriptive right of the plaintiff to this use of the stream Upon this point we can entertain no doubt. As a riparian proprietor, he has lost the right to use

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the water in its natural flow or passage through his land, by the long continued adverse user of the plaintiff and those under whom he claims, not only to control the quantity of water which should be allowed to pass down the natural channel through his land, but also to regulate the time when it should be drawn out of the reservoir, in order to pass down to the plaintiff's mill. He must therefore use the water in subordination to this superior right of the plaintiff. He is not to be deprived of the privilege of making any appropriation of the stream, but only of such use of the water as may be inconsistent with that which the plaintiff has acquired, or may operate injuriously on the working of his mill and machinery.

If it be asked what is the measure or standard by which the defendant's right is to be regulated and governed, the answer is obvious. He can make a reasonable appropriation of the water as it is let down from the reservoir and passes through his land, having regard to the proper and reasonable use by the plaintiff of the prescriptive right which he has acquired. He can neither retard the water so as to prevent the plaintiff's mill from running for any considerable period of time when the water is let down from the reservoir, nor can he hold it back for the purpose of collecting water which is to be drawn down in such quantities that the plaintiff cannot by the reasonable and ordinary use of his mill properly appropriate and apply it to the driving of his works, and thus cause the water to run to waste. On the facts agreed, it is apparent that the defendant has made such an unreasonable and unlawful appropriation of the water to the hindrance and injury of the plaintiff's works. He could not lawfully hold back the water as it flowed from the reservoir for the purpose of filling and refilling the pond created by the erection of the new stone dam near his own mill, as set forth in the agreed facts; nor could he properly let down the water in such quantities that the plaintiff could not appropriate it to the proper operation of his mill, whereby the water ran to waste. Yet it appears that he has done so to such an extent that the plaintiff's mill is interfered with and hindered on some occasions so that it cannot be operated for half the time that it was formerly

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accustomed to run. Under these circumstances, there can be no doubt that the rights of the plaintiff have been palpably infringed. It is immaterial that the defendant uses no more water than is advantageous for the working of his mill. He is bound to use the water with a due regard to the rights of others, and not merely with reference to the profitable employment of his own works.

The case at bar differs from *Gould* v. *Boston Duck Co. ubi supra.* In that case, there was no prescriptive right in the plaintiff to maintain a reservoir in connection with a mill, for the purpose of regulating the time and mode in which the water should flow in the stream and be used in operating such mill. But it was the ordinary case of a reservoir dam erected only for the purpose of creating a uniform supply of water in a stream, which caused a temporary obstruction to the current of the water, but which did not permanently obstruct or hinder its natural flow in the ordinary channel. *Judgment for the plaintiff.*

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# CASES

ARGUED AND DETERMINED

IN THE

# SUPREME JUDICIAL COURT

FOR THE

## COUNTIES OF FRANKLIN AND HAMPSHIRE, SEPTEMBER TERM 1865, AT GREENFIELD.

PRESENT:

HON. GEORGE T. BIGELOW, CHIEF JUSTICE.
HON. CHARLES A. DEWEY, }
HON. REUBEN A. CHAPMAN, } JUSTICES.
HON. HORACE GRAY, JR., }

## FRANKLIN COUNTY.

### COMMONWEALTH *vs.* JEROME V. C. SMITH & others.*

A railroad corporation is not authorized by common law to mortgage its franchise, without further authority than is conferred by its act of incorporation.

Corporations have the power by common law to issue bonds. But since *St.* 1854, *c.* 286 railroad corporations in this commonwealth have no power to issue bonds for the payment of money, except for the purposes and in the mode therein authorized; and all bonds issued otherwise are void, and a mortgage to secure such bonds is also void.

Although a railroad corporation which has issued such invalid bonds and mortgage does not seek to repudiate them, one who has taken a valid second mortgage which contains no covenants of warranty, but is not made expressly subject to the former mortgage, may take advantage of their invalidity.

Such second mortgagee has a plain, adequate and complete remedy at law, and therefore cannot maintain a bill in equity to procure the cancellation of the first mortgage, and thus remove a cloud upon his title.

* This case was argued in Boston, in February 1865, before BIGELOW, C. J., and DEWEY, HOAR, CHAPMAN and GRAY, JJ.

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BILL IN EQUITY seeking to impeach the validity of a mortgage, executed on the 30th of July 1855 by the Troy and Greenfield Railroad Company to the defendants as trustees, covering by its terms the franchise, railroad and all other property of the corporation, then owned or thereafter to be acquired, to secure bonds to the amount of $900,000, to be issued to the contractor as part compensation for constructing the railroad, payable in thirty years from date. This mortgage recited the provisions of a contract for the construction of the railroad, dated December 30, 1854, to the effect that such bond should be given; and it was made subject to a prior mortgage to the Commonwealth, to secure state bonds to the amount of $2,000,000, which the Commonwealth were to issue under the provisions of *St.* 1854, *c.* 226.

The following facts were agreed: Since the execution of the mortgage to the defendants, the Commonwealth have received two other mortgages upon the railroad and franchise of the Troy and Greenfield Railroad Company, one of which was dated on the 6th of July 1860, and the other on the 5th of March 1862; and also a surrender from the corporation of all their property, subject to redemption under *St.* 1862, *c.* 156. On the 4th of September 1862 the Commonwealth took possession of the mortgaged premises in various towns, for breach of condition, in the manner shown by various certificates thereof, which are now immaterial. The Commonwealth under their various mortgages have at various times, from October 1858 to July 1861, advanced to the Troy and Greenfield Railroad Company large sums of money, amounting in all to several hundred thousand dollars. The corporation, under their mortgage to the defendants, have at various times, from August 1855 to July 1861, issued bonds to the amount in all of $600,000, payable in thirty years from date. All of these bonds were issued in good faith, and are held by *bona fide* holders, and the corporation have issued no other bonds than the above. Before advancing any money to the corporation, the Commonwealth had actual notice of the execution of the mortgage to the defendants, and of the fact that a number of bonds had been issued under the same. The



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amount of capital stock of the corporation which, in December 1856, had been paid in was $143,905.77.

Upon these facts, and others which are now immaterial, the case was reserved by the chief justice for the determination of the whole court.

*D. Foster*, for the Commonwealth. The mortgage to the defendants has never been sanctioned or ratified by the legislature, and its validity must depend on the question whether the common law powers of railroad corporations in Massachusetts permit them to execute mortgages, and if so to what extent. At common law, a railroad corporation has no power to execute any mortgage. This is clearly the English rule. *Winch* v. *Birkenhead, &c. Railway*, 7 Railw. & Canal Cas. 384. *Beman* v. *Rufford*, Ib. 48. *South Yorkshire Railway, &c.* v. *Great Northern Railway*, 9 Exch. 84. *Shrewsbury, &c. Railway* v. *North Western Railway*, 6 H. L. Cas. 113. It is also the prevailing opinion in this country. *Pierce* v. *Emery*, 32 N. H. 504. *Hall* v. *Sullivan Railroad*, 21 Law Reporter, 138. *Tippets* v. *Walker*, 4 Mass. 595. *Gue* v. *Tide Water Canal Co.* 24 How. 257. *Worcester* v. *Western Railroad*, 4 Met. 564. *Treadwell* v. *Salisbury Manuf. Co.* 7 Gray, 404. *Opinion of Justices*, 9 Cush. 611. *Salem Mill Dam* v. *Ropes*, 6 Pick. 32. The statutes of Massachusetts confer no such authority. *St.* 1854, *c.* 286. Gen. Sts. *c.* 63, §§ 120–123. The *St.* of 1854, *c.* 286,* authorizing the issue of bonds of a

* The first three sections of this statute are as follows:

"Sect. 1. Any railroad corporation, established by the laws of this commonwealth, may issue bonds for the purpose of funding its floating debt, or for money which it may borrow for any purpose sanctioned by law; provided, however, that such corporation shall, by a majority of votes at a meeting of its stockholders called for that purpose, be authorized to issue the same, and provided that the bonds so issued shall in no case exceed the amount of capital stock actually paid in by the stockholders of said company.

"Sect. 2. Such bonds may be issued in sums of not less than one hundred dollars each, payable at periods not exceeding twenty years from the date thereof, and may bear a rate of interest not exceeding six per centum per annum, payable annually or semi-annually.

"Sect. 3. No railroad corporation, having issued any bonds under the provisions of this act, shall subsequently make or execute any mortgage upon its road

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certain description and for certain purposes is a virtual prohibition of the issue of any others. *Gelpcke* v. *Dubuque*, 1 Wallace, 221.

The bonds issued under the mortgage to the defendants depart from the statute requirements in many respects. They were issued for an unauthorized purpose. They are payable in thirty years, instead of twenty. They were for an amount greatly exceeding the capital of the company. The bonds being void, the fact that they are held by *bona fide* purchasers is immaterial. Parties who take them are presumed to know the statute law. *Balfour* v. *Ernest*, 5 Jur. (N. S.) 439. *Bissell* v. *Michigan Southern, &c. Railroad*, 22 N. Y. 258. *Pearce* v. *Madison, &c. Railroad*, 21 How. 441. The mortgage must perish with the bonds. It cannot stand as a security for any amount due under the contract for the construction of the railroad. The agreement with the contractor was not to give him valid bonds, but to give him just such bonds as these were. The parties selected a form of security which turns out to be invalid. Under these circumstances, the defendants would not be entitled to have the contract reformed in equity, nor can they set up a superior equity to the Commonwealth in this case. *Hunt* v. *Rousmaniere*, 1 Pet. 1. *Leavitt* v. *Palmer*, 3 Comst. 19.

*S. Bartlett & C. Allen*, for the defendants. Even if it be conceded that the franchise to be a corporation and the delegated right of eminent domain are inalienable, there is nothing in the nature of a franchise to operate a railroad which is of that character. A corporation enters into no contract with the state that it will go on and act under its charter. The security of the state is founded upon the rules which it prescribes and the restrictions which it imposes and the power which it reserves to repeal or alter at will; and upon the power which resides in courts to enforce the due execution of the powers which are granted, or exact forfeitures in case of abuse. It is quite immaterial what persons may compose the corporation; the individuals

equipment and franchise, or any of its property, real or personal, without including in and securing by said mortgage all such bonds previously issued, and all other preëxisting debts and liabilities of said corporation."

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may all change, but the same duties will rest upon the corporation. The great weight of American authority is in favor of the existence of this power. *Morrill* v. *Noyes*, 3 Amer. Law Reg. (N. S.) 18. *Miller* v. *Rutland, &c. Railroad*, 36 Verm. 452, and cases cited. *Platt* v. *New York, &c. Railroad*, 26 Conn. 544. *Hall* v. *Sullivan Railroad*, 21 Law Reporter, 138. *Bowman* v. *Watken*, 2 McLean, 393, 394. *Union Bank* v. *Jacobs*, 6 Humph. (Tenn.) 515. *Dinsmore* v. *Racine, &c. Railroad*, 12 Wisconsin, 649. *Macon, &c. Railroad* v. *Parker*, 9 Georgia, 377. *Pollard* v. *Maddox*, 28 Alab. 321. *Allen* v. *Montgomery Railroad*, 11 Alab. 454. The course of legislation in Massachusetts has recognized this as a common law power. *Sts.* 1857, *c.* 178, §§ 1, 5; 1854, *c.* 423; *c.* 286, § 3; 1841, *c.* 44; Rev. Sts. *c.* 39, § 83; *c.* 44, § 11, *et seq.* The validity of a conveyance, executed by full authority of a corporation, cannot be questioned by third parties, on the ground that the corporation itself had no authority to execute it. Although a corporation has exceeded its authority, yet the question cannot be tried collaterally, but it is a matter between the corporation and the state. In this case, the Commonwealth stands in the attitude of an individual. The corporation itself, while retaining the consideration, could not maintain a bill in equity to escape from its contracts and conveyance. *Chester Glass Co.* v. *Dewey*, 16 Mass. 102, and cases cited. *Parish* v. *Wheeler*, 22 N. Y. 502. The Commonwealth, taking only a quitclaim title, take subject to all equities of which they have notice. They succeed to the rights of the corporation, and to no more. To hold that the Commonwealth can question this conveyance would be to hold that they have greater rights than their grantor had. This cannot be. *Parker* v. *Nightingale*, 6 Allen, 344, 345. *Joslyn* v. *Wyman*, 5 Allen, 62. *Taylor* v. *Dean*, 7 Allen, 251. *Vermont, &c. Railroad* v. *Vermont Central Railroad*, 34 Verm. 1. *Morrill* v. *Noyes, ubi supra*. *Silver Lake Bank* v. *North*, 4 Johns. Ch. 370.

The validity of the bonds which the mortgage to the defendants was given to secure cannot be questioned in this process. By common law, clearly the corporation might issue such bonds A cardinal rule of construction is, that a statute will not be

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construed to abridge a common law power, unless its terms are clear. And the cases are very numerous where the literal construction of statutes has been departed from, in order to avoid unjust consequences, and to carry out the presumed intent of the legislature. Dwarris on Sts. 544, 564, 593–595, 606–611, 652, 653. Smith on Const. & Stat. Law, 694, 792. See also *Ex parte Meymot*, 1 Atk. 196, 199; *Cole* v. *Green*, 6 Man. & Gr. 872, 890; S. *C.* 7 Scott, N. R. 682; *Bulkley* v. *Derby Fishing Co.* 2 Conn. 252; *United States* v. *Fisher*, 2 Cranch, 400; *Staniels* v. *Raymond*, 4 Cush. 316; *Stebbins* v. *Merritt*, 10 Cush. 27, 31, 32. The cases arising under the statutes concerning settlements, usury, limitations, taxes, insolvent debtors, intoxicating liquors, and the proceedings of public officers furnish numerous other illustrations. Various bonds not executed in conformity to the statutes which required them have been held valid. *Bank of Brighton* v. *Smith*, 5 Allen, 413, and cases cited. *Locke* v. *Johnson*, 3 Allen, 153. *Pratt* v. *Gibbs*, 9 Cush. 82. *Simonds* v. *Parker*, 1 Met. 513. As a general rule, the forms prescribed for bonds are held to be merely directory. Angell & Ames on Corp. § 254. *Bank of Northern Liberties* v. *Cresson*, 12 S. & R. 306. So county bonds and municipal bonds irregularly issued have been held valid, in the hands of *bona fide* holders. *Mercer County* v. *Hacket*, 1 Wallace, 83. *Gelpcke* v. *Dubuque*, Ib. 175. *Meyer* v. *Muscatine*, Ib. 384. *Moran* v. *Miami Commissioners*, 2 Black, 722. *Woods* v. *Lawrence County*, 1 Black, 386.

The *St.* of 1854, *c.* 286, was not designed to deprive corporations of existing rights. Section 1 declared the right to issue bonds for certain purposes. But there were various other purposes for which, by common law, they clearly might issue bonds: as, for instance, to aid in constructing their road; to dissolve an attachment; to submit to arbitration; to prosecute a writ of replevin; and to convey property. It might be considered doubtful by some whether they had a right to issue bonds for the purposes named in the statute; but the giving of authority for these purposes did not abridge their general power to issue bonds for other lawful purposes. *Mobile, &c. Railroad* v. *Talman*, 15 Alab. 472. *Allen* v. *Montgomery Railroad*, 11 Alab. 437, 454. *Union*

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*Bank* v. *Jacobs*, 6 Humph. 515. The statute, therefore, does not apply, in any of its sections, to these bonds, which were issued for purposes not therein contemplated.

The provisions as to the form of the bonds are merely directory. Four suggestions are grouped together. Neither one is essential. Suppose, for instance, the bonds had been issued at a usurious rate of interest; would they alone, of all usurious contracts, be absolutely void? All of these provisions were simply designed to secure uniformity. The statute does not enact that, for a failure to comply with them, the bonds shall be void; and a strict compliance with them is not essential to the validity of the bonds. See *Bank of Brighton* v. *Smith*, 5 Allen, 417; *Merritt* v. *Stebbins*, 10 Cush. 27; *Hawkes* v. *Eastern Counties' Railway*, 3 De G. & Sm. 743; *Bargate* v. *Shortridge*, 5 H. L. Cas. 297. To give a different construction would involve consequences most unjust. It would enable the Commonwealth, for its own profit, to compel, in a collateral proceeding, an unwilling corporation to repudiate fair contracts entered into in good faith; although the Commonwealth had knowledge of the contracts before advancing a dollar to the corporation. *Parker* v. *Boston & Maine Railroad*, 3 Cush. 117.

Even if the bonds are invalid, the debt of the corporation remains. They have agreed to give a good mortgage and good bonds. They are equitably bound by their promise to pay for the value which they received, although through accident or inadvertence or mutual mistake the promise is expressed in an invalid form. Must not the Commonwealth respect this equity? *Union Bank* v. *Jacobs*, 6 Humph. 515, and Chancellor Kent's opinion, in note. The Commonwealth is in the position of a subsequent purchaser with notice. 3 Powell on Mortg. 1049–1058 *a*. *Dale* v. *Smithwick*, 2 Vern. 151. *Card* v. *Jaffray*, 2 Sch. & Lef. 374.

Hoar, J. The question whether the mortgage made to the defendants by the Troy and Greenfield Railroad Company is of any validity against the Commonwealth requires the court to give a construction to the provisions of *St.* 1854, *c.* 286. To ascertain what the legislature intended to authorize or prohibit by

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that statute, it will be expedient first to consider what were the powers of railroad companies in relation to the issue of bonds and the making of mortgages at common law, or before the statute was enacted.

There seems to be no reason why a railroad corporation should not be considered as having power to make a bond for any purpose for which it may lawfully contract a debt, without any special authority to that effect, unless restrained by some restriction, express or implied, in its charter, or in some other legislative act. A bond is merely an obligation under seal. A corporation having the capacity to sue and be sued, the right to make contracts, under which it may incur debts, and the right to make and use a common seal, a contract under seal is not only within the scope of its powers, but was originally the usual and peculiarly appropriate form of corporate agreement. The general power to dispose of and alienate its property is also incidental to every corporation not restricted in this respect by express legislation, or by "the purposes for which it is created, and the nature of the duties and liabilities imposed by its charter." *Treadwell* v. *Salisbury Manuf. Co.* 7 Gray, 404.

But in the case of a railroad company, created for the express and sole purpose of constructing, owning and managing a railroad; authorized to take land for this public purpose under the right of eminent domain; whose powers are to be exercised by officers expressly designated by statute; having public duties, the discharge of which is the leading object of its creation; required to make returns to the legislature; there are certainly great, and, in our opinion, insuperable objections to the doctrine that its franchise can be alienated, and its powers and privileges conferred by its own act upon another person or body, without authority other than that derived from the fact of its own incorporation. The franchise to be a corporation clearly cannot be transferred by any corporate body, of its own will. Such a franchise is not, in its own nature, transmissible. The power to mortgage can only be coextensive with the power to alienate absolutely, because every mortgage may become an absolute conveyance by foreclosure. And although the franchise to exist

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as a corporation is distinguishable from the franchises to be enjoyed and used by the corporation after its creation, yet the transfer of the latter differs essentially from the mere alienation of ordinary corporate property. The right of a railroad company to continue in being depends upon the performance of its public duties. Having once established its road, if that and its franchise of managing, using and taking tolls or fares upon the same are alienated, its whole power to perform its most important functions is at an end. A manufacturing company may sell its mill, and buy another; but a railroad company cannot make a new railroad at its pleasure.

The whole reasoning of the court in the case of *Whittenton Mills* v. *Upton*, 10 Gray, 582, in which it was held that a manufacturing corporation has no power to make a contract of copartnership, applies with much greater force to the transfer of its franchise by a railroad company.

No case has been cited in which the exercise of such a power has ever been judicially sanctioned in this commonwealth, where there was not express legislative authority for it; and the cases in which the legislature has expressly conferred the power, or confirmed its exercise, furnish at once a strong implication that it would not otherwise exist, and afford a solution of the allusion to railroad mortgages which occurs in the statutes.

Coming, then, to the consideration of the statute of 1854, we find it entitled "An act to authorize railroad companies to issue bonds." The first section recites the purposes for which a railroad corporation may issue bonds, namely, "for the purpose of funding its floating debt, or for money which it may borrow for any purpose sanctioned by law." This is, on its face, merely permissive. But it presents this alternative of construction. Either the corporation did not, in the view of the legislature, have the right to issue bonds without the permission, in which case all the conditions and limitations attached to the privilege must be held to qualify and define the extent of the permission given; or if the full right existed when the statute was passed, then it seems impossible to give any other sensible meaning to its provisions, except to construe it as prescribing the conditions

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and limitations under which the power might thereafter be exercised. The question is, did the legislature intend that these companies should be allowed to issue bonds only in the mode and for the purposes authorized by the statute? If that intention is made apparent, it makes no difference whether the language is affirmative or negative. The same section, then, contains two provisions: first, that the issue of bonds shall be authorized by a majority of the stockholders, at a meeting called for the purpose; and secondly, that the amount of bonds issued shall not exceed the amount of capital actually paid in. The second section provides that such bonds may be issued in sums of not less than one hundred dollars each, payable at periods not exceeding twenty years from the date thereof, and at a rate of interest not exceeding six per centum per annum, payable annually or semi-annually. The language is still affirmative and permissive, but strictly limiting the nature and extent of the act allowed. The third section enacts that no railroad corporation, having issued any bonds under the provisions of the act, shall subsequently make or execute any mortgage upon its road, equipment and franchise, or any of its property, without including in and securing by said mortgage all such bonds previously issued, and all other preëxisting debts and liabilities of said corporation. This section certainly implies that a railroad corporation may mortgage its road and franchise under some circumstances, but gives no direct authority to make such a mortgage; and it plainly prohibits any mortgage which does not conform to the rule imposed. The fourth and fifth sections provide securities for the correct issue of the bonds, and for making them binding on the corporation, though sold at less than par.

The court are all of opinion that the statute was intended to prescribe the terms and conditions on which railroad corporations should thenceforth be allowed to issue bonds, and that any bonds which have been issued since its passage and do not conform to those conditions are made in violation of law, and are therefore void. We cannot suppose that the legislature could intend to pass an act to make legal certain bonds which the corporations had full power to issue without such authority, and

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which would leave all other bonds of equal validity. It must be remembered that these corporations are bodies created for public purposes; that their charters are made subject to repeal or alteration at the pleasure of the legislature; and that the Commonwealth has reserved full power to regulate and control their action by general or special laws. The language of the statute is in substance this: "Such are the bonds which railroad corporations may henceforth issue." To declare that they may be issued on certain fixed conditions is, in effect, to enact that they shall not be issued in any other manner.

That bonds issued in violation of a statute are void, was held in a recent case in the queen's bench in England — *Chambers v. Manchester & Milford Railway*, 26 Law Reporter, 583. The prohibition in the statute on which that case depended was more direct, but the principle applicable to it is the same, and rests upon strong and just foundations in reason.

The bonds issued by the Troy and Greenfield Railroad Company for securing which the mortgage held by the defendants, as trustees, was made, are payable at a period exceeding twenty years from their date, and were issued to an amount very largely in excess of the amount of capital stock actually paid in. The legislature did not mean that such bonds should be made. Their illegality is apparent upon their face, and open equally to the knowledge of the party who issued and the party who received them.

The bonds being invalid, the mortgage to secure them is invalid likewise. It becomes unnecessary, therefore, to consider the questions which have been so largely and ably discussed in the argument, to what extent the power to make a mortgage of a railroad has been recognized, or exists by implication under our statutes, and especially whether such a power is conferred, to any extent, by the statute of 1854. But it may be well to observe that the object of that statute seems to have been exclusively the regulation of the issue of bonds by railroad corporations; and that mortgages are only mentioned incidentally with reference to the future security of the bonds, and not with any view of defining or extending the general power of making

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mortgages. And further, we understand the bonds which are the subject of the statute to be only bonds for the payment of money, constituting a funded debt of the company; and do not consider the opinion which we have expressed to have any application to bonds for other purposes, and of a different character, such as bonds to dissolve an attachment, for the conveyance of land, or the like. Nor do we mean to decide that some of the provisions of the statute may not be merely directory.

We find no evidence that the Commonwealth has ever known and sanctioned the irregular and illegal issue of the bonds in question, either directly or by implication. Nor do we think that they fall within the class of cases in which it has been held that a violation of corporate powers cannot be taken advantage of collaterally. The second mortgage to the Commonwealth gives it a direct interest in the property, and, not being made expressly subject to any prior incumbrance, gives the right to maintain and prove that the supposed conveyance to the defendants was illegal and void.

The result to which the point decided leads is this: that, the defendants having no title which they can maintain against either of the mortgages to the Commonwealth, the plaintiffs have a plain, complete and adequate remedy at law for any interference with the mortgaged property, and the bill must be dismissed.*

* The following case from Middlesex County, involving similar questions, was argued in February 1865 in Boston: —

EAST BOSTON FREIGHT RAILROAD COMPANY *vs.* GARDINER G. HUBBARD & another.

TORT, in the nature of trespass *quare clausum*.

It was agreed, in the superior court, that in November 1855 the Grand Junction Railroad and Depot Company, having before then at five several times issued bonds amounting in all to $1,140,000, which all remained due, and portions of which were secured by mortgages upon different parts of their railroad, issued other bonds to the amount of $100,000, which were secured by a mortgage to two trustees, upon another part of their railroad. The company at the same time owed a floating debt of about $100,000, which was not included in the mortgage; and the amount of capital stock paid in was $792,291.66. In 1856

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## Benjamin N. Bullock & another *vs.* George P. Hayward.

In an action of tort in the nature of waste, all the owners of the place wasted must join as plaintiffs.

A right to commence such action passes by an assignment in insolvency.

If the misjoinder of a plaintiff is not alleged in the answer, under the recent statutes of this commonwealth, and evidence is introduced without objection at the trial to prove such misjoinder, it is too late to object to its admissibility at the argument in this court.

Gray, J. This is an action of tort in the nature of waste, brought on the 29th of September 1862 by Benjamin N. Bullock

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the company became insolvent, and in April 1862 George W. Gordon recovered judgment against them for $25,667, and the sheriff levied his execution upon their franchise, and sold the same, with all the rights and privileges, so far as related to the receiving of tolls, for the term of ninety-nine years, by auction, for the amount of damages and costs in the execution, to the plaintiffs, who by their charter were authorized to lease or purchase the same.

One of the original trustees in the mortgage of November 1855 afterwards died, and the other resigned; and the defendants were appointed in their place, and entered upon the premises described in the mortgage for the purpose of foreclosure.

Upon these facts judgment was rendered for the plaintiffs, and the defendants appealed to this court.

*S. Bartlett & G. G. Hubbard*, (*H. W. Muzzey* with them,) for the defendants.

*J. G. Abbott & B. Dean*, for the plaintiffs.

Hoar, J. The title of the plaintiffs is good, unless the defendants can show a paramount title; and the question is on the validity of the mortgage under which the defendants claim. It was made to secure $100,000 of bonds issued by the Grand Junction Railroad and Depot Company in November 1855; the corporation owing at that time $1,140,000 of bonds previously issued, and its whole capital then actually paid in by the stockholders amounting to $792,291.66. The bonds were therefore issued in direct violation of *St.* 1854, *c.* 286, § 1, and the mortgage is affected by the like illegality. *Commonwealth* v. *Smith*, *ante*, 448. A further objection to the mortgage is, that it seems to have been made in disregard of § 3 of the same statute; there having been outstanding liabilities of the corporation at that time to the amount of $100,000, which were not secured by it.

If these objections were not sufficient, it might be very difficult to find what legal effect a mortgage of the franchise of a railroad company over a portion of its road could have, or how it could be supported for any purpose

*Judgment for the plaintiffs upon the facts agreed.*

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and Dwight Bullock, to recover for waste committed before August 1859 upon land then owned by the plaintiffs jointly, subject to their mother's right of dower. Upon proceedings in insolvency instituted in August 1859 Dwight Bullock's estate was duly assigned, and in December 1859 his interest in this land was sold by his assignees in insolvency to his wife. These facts appearing at the trial, the jury were instructed that the action could not be maintained, and a verdict was taken for the defendant, which, by the terms of the report of the presiding justice, is to stand if this direction was right.

The general rule of the common law is familiarly known, that tenants in common must sever in real actions, because their estates are several; but must join in any personal action, even for an injury to their real estate, because the damages belong to them jointly. *Daniels* v. *Daniels*, 7 Mass. 137. *May* v. *Parker*, 12 Pick. 38, 39. Real actions of waste to recover the place wasted must therefore be brought by them separately, but in a personal action in the nature of waste they must all join. The provision of our statutes, by which any person entitled to bring an action of waste may instead thereof bring an action of tort in the nature of waste, was not intended to authorize the bringing of several actions to recover joint damages, but only to confirm the law as it was generally understood before this provision was introduced. Rev. Sts. *c.* 105, § 4, and commissioners' note. Gen. Sts. *c.* 138, § 4. If this action therefore had been commenced before the assignment of the estate of one of the plaintiffs under the insolvent laws, it would have been rightly brought.

But that assignment vested in the assignees in insolvency all the debtor's property, real or personal, and all rights of action to recover either the property itself, or damages for injuries to it. Gen. Sts. *c.* 118, §§ 44, 47 *Gray* v. *Bennett*, 3 Met. 525, 531. *Stearns* v. *Harris*, 8 Allen, 598. Dwight Bullock's assignees, or their grantee, if they had transferred their right, should consequently have joined, instead of Dwight himself, with the other plaintiff in this action. It is true that the non-joinder of either of those persons could not be given in evidence to defeat the action under the general denial in the answer, and, not having

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been pleaded in abatement, could not be availed of except so far as to prevent Benjamin N. Bullock, if he had sued alone, from recovering more damages than in proportion to his own interest. Gould Pl. *c.* 5, §§ 111, 112. *Putney* v. *Lapham*, 10 Cush. 234. But the misjoinder of Dwight Bullock need not be so pleaded, and, at common law, might have been given in evidence under the general issue, or taken advantage of at any stage of the case at which it appeared. Gould Pl. *c.* 5, § 113. *Glover* v. *Hunnewell*, 6 Pick. 222. Since the statutes have authorized amendments by striking out or inserting the names of joint parties to an action, abolished the general issue, and required the grounds of defence to be precisely stated, we should be unwilling to say that the defendant was not required by law to specify this defence in his answer to the merits, instead of merely denying all the plaintiff's allegations, as he has done. See Gen. Sts. *c.* 129, §§ 17, 20, 21. *Dodge* v. *Williamson*, 3 Met. 292. But as the plaintiffs made no objection to the sufficiency of the answer in this respect at the trial, when it might have been readily amended, it is too late for them to do so now. *Jones* v. *Sisson*, 6 Gray, 288. After the introduction of evidence to show that one of the plaintiffs had no interest in the action, they allowed the case to be brought to this court for argument and adjudication, without moving to amend their writ by striking out his name and inserting the names of his assignees or their grantee. An amendment by striking out his name only would leave the writ subject to be abated for the non-joinder of such assignees or grantee. And an amendment substituting, for the name of Dwight, those of the present owners of his right, could not reasonably be allowed at this stage, except upon such terms as would be equivalent to obliging the plaintiffs to begin anew. The verdict must therefore stand, and there must be

*Judgment for the defendants.*

*A. Brainard*, for the plaintiffs.

*D. Aiken*, for the defendant.

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## Dwight H. Hicks *vs.* George L. Chapman & Trustees.

A claim against a spendthrift under guardianship may be enforced by a trustee process, and the creditor is not confined to a suit upon the guardian's bond.

If real estate of a spendthrift is orally leased by his guardian, with nothing in the terms of the contract to show specially that it was the personal contract of the guardian, the rent due may be attached for the ward's debts by a trustee process.

Chapman, J. The plaintiff has obtained a judgment against the defendant, who is a spendthrift under guardianship, and contends that he has also a right to charge the trustees upon their answer. His judgment is for the amount of a debt due from the defendant to him, and the trustees admit that they hired of the guardians a tenement belonging to the ward, and owe them for one quarter's rent. The plaintiff has an adequate remedy under our statutes, Gen. Sts. *c.* 109, to recover the amount of his judgment, by an action against the guardians on their bond. *Conant* v. *Kendall*, 21 Pick. 36. *Cole* v. *Eaton*, 8 Cush. 587. The guardians who defend this action contend that this remedy is exclusive, and they also contend that the rent due from the trustees is due to them and not to the ward.

But we cannot regard the remedy by action upon the bond as exclusive, for § 20 of the chapter cited above provides that a guardian may appoint an appraiser of real estate on execution either against or in favor of his ward. This implies that the creditor may take execution upon his judgment, and levy it upon the real estate of the ward, if he has any. In *Thacher* v. *Dinsmore*, 5 Mass. 299, it is said that the ward's property may be taken on execution; and in *Ex parte Leighton*, 14 Mass. 207, it was held that his body might be taken. Indeed, if the creditor may take execution at all it must be in the usual form, there being no provision to the contrary; and, when issued, an officer may execute it according to the precept.

The provisions of *c.* 142 respecting trustee process are general, and contain no exception in favor of persons under guardianship; and since the real and personal estate of the debtor is alike liable to be levied upon, there seems to be no good reason why

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his goods and estate in the hands of a trustee should not also be liable. If the legislature had intended to limit the creditor's remedy to an action against the guardian upon his bond, the obvious method would have been to prohibit the issue of an execution upon the judgment. If it be suggested that a guardian needs the property, in order that he may be able to make a *pro rata* distribution of it among the ward's creditors in case there is not sufficient to pay them in full, the answer is, that there is no occasion to place an insolvent debtor under guardianship as a spendthrift in order to prevent him from wasting his estate; and, if there were occasion for it, the exemption should be extended to all his property. If then this debt is to be regarded as the property of the ward, there is no reason why it should not be subject to attachment by trustee process.

But it is contended that the debt is due to the guardians, and not to the ward, and is so far their property as to be exempt from this process. In order to determine this point, it is necessary to consider the nature of their office. It is created by statute, and is in some respects unlike the office of guardian as it has existed by the common law in England. Guardians are not, like executors, administrators or trustees, invested with a legal title to the property which is placed under their care; but they have a naked power, not coupled with an interest. The debts of the ward remain his, so that, though he has no power to pay them, yet he, and not the guardians, must be sued upon them. *Brown* v. *Chase*, 4 Mass. 436. If they defend actions brought against him, they must defend in his name and not in their own. If they bring actions, it must be in his name and not in their own, and the judgment is in his name. The proper discharge of their duties does not require them to subject themselves to any personal litigation or liability for costs. It is true that they may make contracts in their own names, and such contracts bind themselves, but do not bind either the ward or his estate. *Thacher* v. *Dinsmore*, 5 Mass. 299. *Forster* v. *Fuller* 6 Mass. 58. *Jones* v. *Brewer*, 1 Pick. 314. *Whiting* v. *Dewey* 15 Pick. 428. *Spring* v. *Woodworth*, 4 Allen, 326. After their discharge or death, neither the ward, if discharged from

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guardianship, nor the successor of the guardians, becomes a party to such contracts.

It is true that they are not strictly the agents of the ward when they act in his name. Their power is derived from the Commonwealth; its authority being delegated to the judge of probate. He appoints the guardians; they give bond to him and are accountable to him. Their liability to him is very strict; and the ward is so powerless that his consent is no excuse for any mismanagement on their part. *Harding* v. *Larned*, 4 Allen, 426. Their power over the property entirely supersedes that of the ward, his capacity being taken away by statute and conferred upon the guardians. *Manson* v. *Felton*, 13 Pick. 206. They have the control and management of his property. They may rent his real estate in their own names, so as to bind the lessee to them personally, and themselves personally to the lessee. On such a letting it follows from the principles above stated that they must sue and be sued in their own names; but they cannot in such a case be said to exercise a mere authority not coupled with an interest. They involve themselves in personal liabilities without necessity, by making such a contract. As it must be a contract on which they and their executors or administrators must sue and be sued in case of their resignation or death, it tends to create embarrassment. For these reasons their lease of the ward's lands ought not to be construed as a personal contract, so as to vest the property of the rents in them, if it can fairly be construed as a contract which does not vest any interest in themselves.

The answer of the trustees in this case is not very definite in this respect. The language of it is simply that they "hired of the said guardians rooms belonging to the estate of said Chapman for one hundred and twenty-five dollars a year, payable quarterly; and that at the time of the service of the process one quarter's rent was due by said contract with said guardians." A majority of the court are of opinion that this is to be so interpreted as to import that they have exercised an authority not coupled with an interest, in making the lease, so that in case of their discharge or death it may be enforced by their successors



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in office, or by the ward in case of his discharge from guardianship, and not by themselves or their executors or administrators. Being a contract of this character, the result is, that the rent is legally due to the ward, although he is incapable of doing any act in respect to it, and is his property in the hands of the trustees, so as to be subject to this process. *Trustees charged.*

*S. T. Field*, for the plaintiff, besides cases cited in the opinion, cited *Aldrich* v. *Williams*, 13 Verm. 373; *Hutchins* v. *Dresser*, 26 Maine, 76; *Tenney* v. *Evans*, 11 N. H. 346; *Carrique* v. *Sidebottom*, 3 Met. 297.

*D. Aiken*, for the trustees.

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PATRICK BUTLER *vs.* QUINCY A. SEWARD & others.

One who has executed to different persons two mortgages upon the same land, with covenants of warranty, cannot, after the titles under the two mortgages have both become united in one person, and the second mortgage has been foreclosed, be allowed to open the foreclosure by paying the sum secured by the first mortgage.

BILL IN EQUITY to redeem land from a mortgage. The case was referred to a special master, by whose report the following facts appeared:

On the 30th of November 1852 the plaintiff mortgaged two lots of land to Daniel Wells, to secure one note of $300, payable in team work, and four negotiable notes of $100 each, payable in one, two, three and four years, respectively. On the same day, Judge Wells assigned the negotiable notes to Daniel W. Alvord, free from any equities existing between himself and Butler. Mr. Alvord afterwards assigned them to the defendant Seward, to whom the administrator of the estate of Judge Wells assigned the mortgage.

Butler afterwards built two houses on one of the lots, called the second lot, and on the 23d of July 1853 mortgaged the same, with covenants of warranty, to Amos Pond to secure a note of $398.77. The administrator of Pond's estate recovered conditional judgment against Butler on this mortgage, and was put

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in possession on the 31st of March 1856, and the foreclosure became absolute at the expiration of three years. The title under both mortgages afterwards became united in the defendants.

The plaintiff contended that, by paying the amount secured by the first mortgage, he could be let in to redeem the second; and this question was reserved for the determination of the full court.

*A. Brainard*, for the plaintiff.

*D. Aiken*, for the defendants.

Bigelow, C. J. The plaintiff's claim to be let in to redeem the parcel of land included in his mortgage to Amos Pond, designated in the master's report as the "second lot," cannot be supported. The difficulty is, that in redeeming the first mortgage on the lots, he does not become an equitable assignee thereof, nor is he subrogated to the rights of the first mortgagee. Inasmuch as he was the mortgagor in both deeds, by redeeming the first mortgage he will in fact pay his own debt, and thereby discharge and extinguish the mortgage. He cannot therefore set it up as the ground of a claim to redeem a subsequent mortgage made by himself, which has been foreclosed. His relation as debtor and mortgagor in the first mortgage is incompatible with any claim to be regarded as an equitable assignee thereof, on payment of the debt. It was his duty to pay and cancel the mortgage, and to relieve the estate from this incumbrance as against the subsequent mortgagee to whom he had conveyed the estate with warranty; and he cannot be allowed to set up such payment as conferring any right in equity on him to redeem a subsequent mortgage on the same estate made by himself, which has been foreclosed. It is only when the purposes of justice require that the payment of a mortgage debt shall be regarded as an assignment instead of an extinguishment of the mortgage, that it will be held so to operate. 1 Washburn on Real Prop. 575. *Brown* v. *Lapham*, 3 Cush. 551. *Kilborn* v *Robbins*, 8 Allen, 471.

There is another insuperable obstacle in the way of allowing the plaintiff to set up any right by virtue of the payment of the

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debt secured by the first mortgage, as a ground for reopening the foreclosure of the second mortgage. By the latter conveyance, he granted the estate with covenants of warranty against all incumbrances. This covenant estops him from setting up the first mortgage as against the defendants, who are assignees of the second, and to whom he would be responsible for a breach, if the first mortgage was allowed to have effect against the title acquired under the foreclosure of the second. *Comstock* v. *Smith*, 13 Pick. 119. *Trull* v. *Eastman*, 3 Met. 124.

For these reasons, it is clear that the plaintiff has shown no claim to a decree for redemption of the parcel included in the deed to Pond, and that he must be confined to a redemption of the remaining parcel described in the first mortgage.

*Decree accordingly.*

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CHARLES POMROY *vs.* JONATHAN LYMAN.

An attachment in another state upon a writ against a debtor who is in insolvency in this commonwealth, of property which belonged to him before his insolvency, will render the attaching creditor liable, as for a conversion, to the purchaser of the property who was in possession of it under a claim of title at the time of the attachment, although the sale to such purchaser was in fraud of creditors.

TORT for the conversion of a quantity of broom brush.

At the trial in the superior court, before *Wilkinson*, J., it appeared that the broom brush originally belonged to William Brown, who in 1860 executed a bill of sale thereof to the plaintiff, to secure him for certain liabilities assumed for Brown, and delivered to him the possession thereof in Vermont. Subsequently Brown was put into insolvency, on petition of creditors; the assignee in insolvency demanded this broom brush of the plaintiff; and thereafter the defendant sued out a writ against Brown in Vermont, and attached the broom brush, which remained there in the plaintiff's possession, and sold the same upon the execution which he obtained in his suit. The defend ant offered to prove that the conveyance by Brown to the plaintiff

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was in fraud of creditors; but the evidence was excluded. Both parties were and are citizens of Massachusetts.

The jury returned a verdict for the plaintiff, under instructions authorizing them to do so; and the defendant alleged exceptions.

*D. Aiken*, for the defendant. The attachment in Vermont was lawful. *Dehon* v. *Foster*, 4 Allen, 552. The plaintiff cannot interpose the title of the assignee, under which he does not claim, to exclude the evidence of fraud. *Hall* v. *Stevens*, 9 Met. 418. *King* v. *Barns*, 13 Pick. 24.

*G. T. Davis*, for the plaintiff.

Gray, J. There can be no doubt of the right of the plaintiff to maintain this action. At the time of the defendant's attachment on his writ against Brown in Vermont, the plaintiff was in possession of the property under a claim of title, and all Brown's interest in the property had passed to his assignee in insolvency under proceedings in this commonwealth by a title which the defendant, a citizen of Massachusetts, could not controvert. *Hubbard* v. *Lyman*, 8 Allen, 520. *Dehon* v. *Foster*, 4 Allen, 552, 553; *S. C.* 7 Allen, 57. *Hanford* v. *Paine*, 32 Verm. 442. *Hoag* v. *Hunt*, 1 Foster, (N. H.) 106.

*Exceptions overruled*

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Joseph Sears *vs.* Ansel L. Tyler & others.

The selectmen of a town are not liable to the penalty provided by Gen. Sts. *c.* 86, § 17, for a failure to appoint an agent for the sale of spirituous and intoxicating liquors, if they have in due season appointed a person who has declined to serve, and there has been no careless omission or wilful neglect to appoint another.

Tort against the selectmen of Charlemont, to recover the penalty of $100, alleged to have been forfeited by reason of their failure to make a legal appointment of an agent for the sale of spirituous and intoxicating liquors, under Gen. Sts. *c.* 86, § 17. At the trial in the superior court, before *Morton*, J., a verdict was returned for the defendants, under directions so to do, upon facts

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which are sufficiently stated in the opinion. The plaintiff alleged exceptions.

*S. T. Field*, for the plaintiff.

*D. Aiken*, for the defendants.

BIGELOW, C. J. On the facts shown at the trial, the defendants are not liable to the penalty prescribed by Gen. Sts. *c.* 86, § 17. They made an appointment in due season, which the person appointed declined to accept. Afterwards, and as soon as a suitable appointment could be effectually made, another agent was duly constituted according to law. It does not appear that the defendants did not act with proper diligence, and it is agreed that they did not omit to perform their duty through any want of good faith, or from an intention to evade the provisions of the law. The statute is designed only to inflict a penalty where there has been a careless omission or wilful neglect to comply with its provisions. There was no evidence of such omission or neglect on the part of the defendants. We cannot distinguish the case from *Rowe* v. *Edmands*, 3 Allen, 334. There was no effectual appointment of an agent in that case. He could not act until he had given bond, and his failure to give a bond within a reasonable time was, in effect, a refusal to accept the office. *Exceptions overruled.*

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## HAMPSHIRE COUNTY.

### SAMUEL PINCH *vs.* EDWARD ANTHONY & others.

If the owners of mineral lands enter into a written agreement with another person, reciting their purpose either to sell the lands or form a joint stock company for working the mines thereon, and promising, in consideration of services rendered and to be rendered by him to pay to him a certain sum "out of the proceeds of the sale of said lands, if the same shall be sold, or, if the lands shall not be sold, and a company shall be formed for working the mines thereon," then to convey to him stock to that amount, "it being understood and agreed by and between the parties hereto that the foregoing amount, whether of cash or stock, is to be a charge on the joint estate" of the owners; and he, in consideration of the foregoing agreements, promises to remain in their service as long as they may require, not exceeding one year, for a salary of $100 per month and a house and land free of rent;

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the owners of the land are not bound to sell the same or to form a joint stock company until by the exercise of reasonable diligence they are able to do so advantageously, having reference to the interests of all the parties; and until such sale or the formation of such a company, or the existence of some negligence on their part, he has no claim against them, except for the stipulated salary.

An objection to a supplemental bill in equity on the ground that it seeks to maintain the suit upon facts which have occurred since the filing of the original bill is waived by omitting to demur to it upon that ground, and consenting to go into a full hearing before a master upon the merits of the case as set forth in the original and supplemental bill.

BILL IN EQUITY, filed April 16th 1861, alleging that in 1849 the plaintiff was a skilful miner employed at Crown Point, and was induced by persons who owned lands in Northampton, Southampton, Easthampton and Westhampton, to leave his employment for the purpose of conducting mining operations upon said lands; that those persons, after executing to the plaintiff a mortgage on the mineral rights in said lands to secure the sum of $1500, for his services and moneys agreed to be paid by him, conveyed the premises to Samuel Coit, who, in consideration of the plaintiff's skill and labor in conducting mining operations thereon, and of moneys advanced by him, executed to the plaintiff another mortgage on said mineral rights to secure the sum of $5000; that afterwards, in 1852, Edward Anthony purchased the premises in behalf of himself and Sandford Coley, Albert W. Wright and Edwin C. Hamilton, (who were all made defendants,) and received a deed thereof, and that, on the 27th of October 1853, said Anthony and his associates, as parties of the first part, entered into an agreement with the plaintiff, as the party of the second part, the material parts of which are set forth in the margin.*

* Whereas the parties of the first part are joint owners of certain mineral lands situated in Southampton, Easthampton and Westhampton, in Hampshire county, in the state of Massachusetts, and which said property is now standing in the name of Edward Anthony; and whereas it is proposed either to sell said mineral lands or to form a joint stock company for the purpose of working the mines on said lands; and whereas the parties of the first part have agreed, in consideration of the services rendered and to be rendered by the said Samuel Pinch, that he the said Samuel Pinch shall have an interest in the proceeds of the sale of said lands, if the same shall be sold, or, if a joint stock company shall be formed, then that he shall have a certain amount of the stock of the company

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The bill further alleged that the plaintiff entered the service of the defendants, and continued therein so long as his services were required, and until the filing of this bill, although since 1854 the defendants have abandoned mining operations on said lands; and that he is entitled to maintain a charge and lien upon said lands for the sum of $6500, and interest from the date of the agreement, and to have the lands sold, and the proceeds applied in payment of his claim.

The plaintiff afterwards filed a supplemental bill, alleging that on the 26th of February 1863 the said Anthony, with a view to the formation of a joint stock company, conveyed the premises to Stephen Hill, Jr., who shortly thereafter conveyed the same to the "Manhan Silver Lead Mining Company," which the plaintiff believes to be a joint stock company; that since the conveyance to Hill, the plaintiff, at Hill's request, has devoted his attention to the development of said mines, and Hill has

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now, therefore, this agreement witnesseth, that the said parties of the first part, in consideration of the foregoing agreement, and in further consideration of one dollar to each of them in hand paid, the receipt whereof is hereby acknowledged, hereby agree to pay or cause to be paid to the said Samuel Pinch, his heirs or assigns, out of the proceeds of the sale of said lands, if the same shall be sold, the sum of $6500; or, if the said lands shall not be sold, and a company shall be formed for the purpose of working the mines thereon, then and in that case to convey or cause to be conveyed unto the said Samuel Pinch, his heirs or assigns, full paid up stock in said company, not liable to assessment, to the amount of $6500, at the par value of said stock; it being understood and agreed by and between the parties hereto that [of] the foregoing amount of $6500, the sum of $5000, whether of cash or stock, is to be a charge on the joint estate of the parties of the first part in proportion to their respective interests, and the remaining $1500 is to be a charge on the separate estate of Albert W. Wright. And the said Samuel Pinch on his part agrees, in consideration of the foregoing agreements, to remain and continue in the employ of the parties of the first part so long as they shall require his services, but not exceeding one year from the date hereof, for the same salary and compensation that has been heretofore paid to him, to wit, $100 per month, and the house and lands now occupied by him rent free; and if his services shall not be required for the full term of one year, he hereby agrees to leave the employ of the parties of the first part, and surrender the possession of the house and lands to them at any time, after receiving one month's notice from them."

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frequently assured the plaintiff that there should be a speedy and satisfactory settlement of his claim, but that such settlement has never been made. The plaintiff therefore prayed that said Hill and Manhan Silver Lead Mining Company might be made defendants, and that he might have such relief as he might be entitled to in equity. Certain other allegations in the supplemental bill are set forth in the opinion.

After the demurrer filed in this case had been overruled, (see 8 Allen, 536,) the defendants filed answers, and the case was referred to a master, who made a report thereon, and the case was reserved for the determination of the whole court. As the decision of the case upon the merits involved no question of law, but rested upon the plaintiff's failure to establish by proof a right to equitable relief, as stated in the opinion, the facts are not here reported.

*C. Delano*, for the plaintiff. The original bill seeks to enforce the plaintiff's claim by compelling a sale of the land. The supplemental bill, without waiving rights or remedies already accrued, seeks to ascertain whether the plaintiff, by reason of the new state of things, is compelled to accept what the defendants have reserved for him.

The plaintiff is still entitled to have a sale, and an application of the proceeds. His lien is established. 8 Allen, 536. The Manhan Company has no title whatever. *Danforth* v. *Penny*, 3 Met. 564. *Gold* v. *Housatonic Railroad*, 1 Gray, 424. *Blackstone Manuf. Co.* v. *Blackstone*, 13 Gray, 488. *Erickson* v. *Nesmith*, 4 Allen, 233. *Farnum* v. *Blackstone Canal*, 1 Sumner, 46. *Bank of Augusta* v. *Earle*, 13 Pet. 519. *Runyan* v. *Coster*, 14 Pet. 122. The great delay to organize a company was unreasonable laches. The burden of showing an organization of a corporation was on the defendants, and they have failed to show it. The laches having entitled the plaintiff to a sale, and there being nothing shown to defeat this right, a decree for a sale should be entered, unless the sum due to him shall be paid within a specified time.

It is too late to object to the supplemental bill. No objection was made to its being filed and the defendants joined in a

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general demurrer to both bills, without assigning as a cause of demurrer that it introduced a new case. They also joined in a general answer. See Story Eq. Pl. §§ 338 *a*, 526, 528; *Clark* v. *Flint*, 22 Pick. 231, 237; *Underhill* v. *Van Cortlandt*, 2 Johns. Ch. 369; *Ludlow* v. *Simond*, 2 Caines Cas. 40, 56. The objection to the supplemental bill was never well founded. Story Eq. Pl. §§ 332–339, 352, 903–905. *Crompton* v. *Wombwell*, 4 Sim. 628. *Colclough* v. *Evans*, Ib. 76. *Jenkins* v. *Eldredge*, 3 Story R. 310. *Wood* v. *Mann*, 2 Sumner, 316, 331. *Hobson* v. *McArthur*, 16 Pet. 182, 194.

*G. T. Davis*, for the defendants.

CHAPMAN, J. If the plaintiff had any cause of action when he filed his original bill, it arose out of the contract of October 27th 1853. It is necessary, therefore, to ascertain the meaning of this contract; and as the parties construe it differently, and its terms are not expressed with fulness and clearness, it is necessary to look into all its parts. Its expressed purpose and the consideration for the defendant's promise will aid us in understanding the promise and giving to it a just interpretation

The articles of agreement are between Anthony, Hamilton, Coley and Wright, who are called parties of the first part, and the plaintiff, who is the party of the second part. It recites that the parties of the first part are joint owners of certain mineral lands in Hampshire County; that the property stands in the name of Anthony; and that it is proposed either to sell said mineral lands or to form a joint stock company for the purpose of working the mines on said lands.

Having expressed this general purpose, it next recites that the parties of the first part have agreed, in consideration of the services rendered and to be rendered by the plaintiff, that he shall have an interest in the proceeds of the sale if the lands are sold, or, if a joint stock company shall be formed, then he shall have a certain amount of the stock of the company.

The services which are thus referred to are not ordinary services, and his interest in the proceeds of the sale or of the joint stock company is not to be regarded as wages; for it is agreed that he shall remain in the employment of the company as long

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as they shall require his services, for the same salary and compensation that have been heretofore paid to him, to wit, $100 per month, and the house and lands occupied by him rent free. This compensation was to be paid absolutely, and has been paid. The services referred to in the above recital, to the amount of $5000, must therefore be extra services, and must refer to efforts to sell the lands as mineral lands, or to form a joint stock company by inducing capitalists to join the parties. Parol evidence is admissible to prove what these services were specifically, for the ambiguity in the reference to them is latent.

It appears by the master's report that the plaintiff is an Englishman, and acquainted with mining; that he had entered into a correspondence with an English mining journal, and brought to the notice of the proprietors one Richardson, who at their request came to Northampton and was made superintendent of the mines, and made some efforts to sell their mining lands to parties in England. There had been some expectation of making a sale of the lands for a very large profit, and the plaintiff was to continue his efforts to make a sale or form a joint stock company.

We then come to the promise. It is, that "out of the proceeds of the sale of said lands, if the same shall be sold," they will pay or cause to be paid to the plaintiff, his heirs or assigns, the sum of $6500; "or, if the said lands shall not be sold, and a company shall be formed for the purpose of working the mines thereon," then they will cause to be conveyed to the plaintiff, his heirs or assigns, full paid up stock, not liable to assessment, to the amount of $6500 at par value. The land is made subject to a charge for the fulfilment of this agreement, to the amount of $5000, and the separate estate of Wright is made subject to a charge for $1500, which was not a charge upon the other parties, nor for services rendered to them; and the plaintiff's bill is brought to enforce the lien and compel the specific performance of the agreement.

When the bill was filed, the parties had not sold the property, nor procured a joint stock company to be formed for working the mines, although more than seven years had elapsed since the

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date of the agreement; and the plaintiff contends that he has a right to compel the defendants to make a sale, and pay him his money out of the proceeds. The defendants reply that neither they nor the plaintiff have succeeded in selling the lands as mineral lands, nor in procuring capitalists to join them in forming a company for working the mines. They allege that the purchase of their lands and mining rights and the working of the same have cost them about $35,000, and they have paid considerable sums to Richardson. They have offered their property for sale for $10,000, and have been ready to sell it, and would have sold it for a less price; they have not failed in judgment or diligence in endeavoring to sell the same; but they have never received a cash offer, and the lands have been unsalable for mining purposes, and for other purposes they would not bring the price paid for them. The master's report finds these allegations to be true, and thereupon the question arises whether the defendants were by the terms of their contract bound to sell the lands before it should be for the mutual interest of all parties to make such sale. The plaintiff contends that they are bound to sell them at all events after the lapse of so much time. But the court are of opinion that the spirit of the agreement and a just construction of the promise, which is merely contingent, and not absolute, require nothing more than that the defendants should consult the joint interest of all the parties, and that they are not bound by it to disregard their own interest, either in making a sale or forming a joint stock company. When the bill was filed, it had not been in the power of the defendants by any reasonable efforts to make sale of the lands for mining purposes, or to form a company to work the mines, and therefore they had not been guilty of any default or neglect in respect to their agreement. If they had made an absolute sale of the lands, the terms of their agreement would entitle the plaintiff to payment of his claim to the amount received; but if they had made a mere conveyance as one step towards getting up a joint stock company, he would not be entitled either to his money or his stock till the company should be completely organized, and the certificates of stock be ready for delivery to the stockholders.

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It appears, then, that at the time of filing the original bill the plaintiff had no cause of action. But the plaintiff afterwards filed a supplemental bill setting forth certain facts that had occurred during the pendency of the suit. It is now objected that the facts set forth in this bill cannot be considered in this suit, but that this bill should be dismissed, and the plaintiff be left to bring a new suit if he has good cause of action.

We have found no authority that goes so far as to authorize a party, who has no cause of action at the time of filing his original bill, to file a supplemental bill in order to maintain his suit upon a cause of action that accrued after the original bill was filed, even though it arose out of the same transaction that was the subject of the original bill. It would seem to be contrary to principle to allow this to be done. *Milner* v. *Milner*, 2 Edw. R. 114, is an authority against allowing a new cause of action to be stated in a supplemental bill. But the plaintiff may by means of a supplemental bill introduce into his case facts that have occurred since the original bill was filed. The extent to which this may be done is not definitely settled. But if he goes too far in this respect, the defendant has opportunity to object to it when leave is asked to file the supplemental bill; *Pedrick* v. *White*, 1 Met. 76; or by demurrer to the bill for that cause after it is filed. In this case the defendants did demur, but did not present this as a ground of demurrer. 8 Allen, 536. The cause was sent to a master, and was recommitted to him by consent of both parties for the purpose of being fully heard upon its merits, and it has been so heard, and his report embraces every matter that would have been needful if a new bill had been filed. The objection to the supplemental bill ought therefore to be regarded as waived. *Pingree* v. *Coffin*, 12 Gray, 288, 323. Story's Eq. Pl. § 528, and *note*. *Underhill* v. *Van Cortlandt*, 2 Johns. Ch. 369.

The plaintiff is entitled, therefore, to have his case considered and determined upon the allegations of his bill and supplemental bill taken together.

The original bill sets forth the title to the land and the contract above mentioned · alleges that the plaintiff devoted himself

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to the service of Anthony and his associates; that the $5000 constituted a charge upon the lands of Anthony, Coley, Hamilton and Wright, and the $1500 constituted a charge upon the estate of Wright; avers that he has a right to have the land sold and the proceeds applied to the payment of his claim, and prays for a sale for that purpose. The supplemental bill, reciting certain pretences which the defendants set up, alleges that, on or about the 26th of February 1863, Anthony, by his deed of that date, upon certain good and valuable considerations, and especially with a view to the formation of a joint stock company or incorporated association, convéyed to Stephen Hill, Jr., of New York, the mineral lands aforesaid, and that Hill agreed to assume and pay whatever claims the plaintiff should establish in this suit, and save Anthony harmless therefrom; that on or about the 24th of April 1863 Hill conveyed the lands to a certain company purporting to be "the Manhan Silver Lead Mining Company," for the nominal consideration of $500,000; but whether the consideration is real or not he does not know. He avers that he believes it to be a joint stock company, or incorporated association; that Hill is a member and holds shares in the same and has been active in directing its operations, and has frequently remitted funds to the plaintiff for advancing its operations; that he has devoted his time, at Hill's request, to the development of the mines, and has requested Hill to pay him the money or deliver to him the paid up stock. He makes Hill and the company parties to the bill, and seeks general relief, waiving an answer under oath.

If the plaintiff is entitled to any relief upon these allegations, it should be by a decree for the conveyance to him of the stock in the Manhan Silver Lead Mining Company to which he is entitled by his contract.

The answer of the defendants admits the conveyance to Hill as alleged, and avers a readiness to pay the plaintiff whatever money or stock he is entitled to. It denies, however, that he has made any demand on them, and on this subject the report finds that no demand has been made, except that within two years after the plaintiff left the service of the original defendants

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he demanded of them a settlement of his claims. As the case stands, however, this difficulty may be passed over. The answer alleges that the land is not worth more than $7500; but admits that the capital stock is $500,000, and that this land has been conveyed to the company at that price, thereby making the stock full paid up stock. But by a fair interpretation of the agreement the plaintiff is entitled to stock paid up in cash or its equivalent. This stock is not of that character. It is suggested in argument that the land was put in at this valuation with a view to defraud the plaintiff. But there is no allegation of fraud in the bill, and whether the object was to defraud the plaintiff or to sell the shares for more than their value to other parties does not appear. Nor does it appear that the defendants have proceeded so far in the organization of the company as to entitle the plaintiff to demand his shares, or to make it desirable that he should take them. For aught that appears, the company is so far unorganized as to be unable to take the land as a grantee, and the land may still be in the hands of Hill as an associate of the original parties, and subject to the plaintiff's lien. Neither the pleadings nor the facts stated in the report are sufficient to establish the plaintiff's title to any present relief upon the construction which we have given to the contract.

*Bill dismissed without prejudice and without costs.*

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MENZO W. FINN *vs.* JOSEPH S. CLARK.

If goods are sent by a carrier, and neither the bill of lading nor the direction upon them enables him to deliver them to the purchaser, and they are lost in consequence, the purchaser may recover back the price paid by him to the vendor for the same; nor will he be presumed to have assented to or waived the vendor's omission, from proof that he received a copy of the imperfect bill of lading before the payment was made, and that he thereafter made diligent inquiry to find the goods.

CONTRACT brought to recover the price of certain shingles sold and delivered. One defence was a claim by way of set-off, for money paid by the defendant to the plaintiff upon a draft for the price of another lot of shingles which the defendant never received.

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At the trial in the superior court, before *Putnam*, J., the defendant introduced evidence to show that in May 1861 he lived in Southampton, Massachusetts, and ordered a lot of shingles from the plaintiff by a letter addressed to him at Olean, New York, where the plaintiff lived. He afterwards received from the plaintiff a letter dated at Olean, May 13th 1861, inclosing a bill and a bill of lading of the shingles, which, the letter said, were "shipped you this day, as per your order." The former contained a charge for freight paid on the same to Greenbush, and for paying boatman to tow across the river at Greenbush; showing the balance due to be $789.82. The bill of lading was as follows: "Olean, May 13th, 1861. Shipped for account of M. W. Finn on board canal boat W. White of Niagara, N. Y. whereof James Smith is master for the present trip, as follows:

| Pieces. | Feet. | Tons. | Lumber. |
|---|---|---|---|
| 100 Bunches | 50 M. of 18 in. | Sorted Shaved Shingle, | marked J. S. C. extra. |
| 150 " | 75 " " | No. 1 " | " J. S. C. |
| 360 " | 90 " " | Extra Sawed " | " J. S. C. extra. |

In good order to be delivered in like good order without delay to the Great Western Rail Road Company or their assignee at Greenbush, N. Y. Assignee to pay freight on the delivery at the rate of seventy-five cents per M. for shaved shingles and 62½ cts. per M. for the sawed shingles and $2 50-100 for towing, less amount advanced master one hundred and fifty-two and 50-100 dollars. M. W. Finn, Consignor. James Smith, Master."

On the 21st of May, after the defendant had received the above letter and bills, he received and accepted a draft for the balance of the bill, after deducting certain credits, and paid the same at maturity.

The shingles referred to came into the possession of the Western Railroad Company at Greenbush, marked as stated in the bill of lading, but with no other mark or direction upon them, and remained there until the 5th of July 1861, when they were destroyed by fire at the time of the burning of the freight depot of that company at Greenbush.

The defendant offered evidence of similar purchases of shingles by him of the plaintiff at various times since 1858, in all

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of which instances they had come properly directed. It also appeared that the defendant made constant inquiry for these shingles at the railroad depot in Westfield, (adjoining Southampton,) where he received his letters, in May and June 1861, and wrote three times to the agent of the Western Railroad Company at Greenbush, inquiring if they had arrived there, but received no information respecting them, except by a letter dated June 25th which did not reach the defendant until after the fire. On the 20th of June the defendant wrote to the plaintiff as follows: "I received yours of the 6th inst. in due time — have been waiting since for the shingles to get here before I wrote, but have heard nothing from them yet. There is but little doing here in the lumber line. If we don't do more in the fall, the shingles on the road will last me until winter. I shall make nothing on them, as they are buying in Albany and selling as cheap as I can." There was no evidence of any complaint by the defendant to the plaintiff that the shingles were not properly directed, and no claim was made to recover back the amount paid upon the draft until the defendant was called on to pay the amount of the bill now in suit, which was dated in May 1862.

Upon this evidence the judge ruled that the defendant was not entitled to recover back the amount paid by him upon the draft, and a verdict was accordingly returned for the plaintiff for the full amount claimed by him; and the defendant alleged exceptions.

*H. B. Stevens*, for the defendant. There being no proper directions for the transportation of the shingles, there was no sale. *Orcutt* v. *Nelson*, 1 Gray, 536. *Putnam* v. *Tillotson*, 13 Met. 517. *Stanton* v. *Eager*, 16 Pick. 467. *Buckman* v. *Levi*, 3 Camp. 414. The circumstances shown constitute no waiver on the part of the defendant. The defendant always supposed that the plaintiff had shipped the shingles according to the order.

*W. G. Bates & M. B. Whitney*, for the plaintiff. The fact that the defendant lived in Southampton and wrote from there does not imply a request to the plaintiff to direct the shingles to him at that place, or bind the plaintiff so to direct them. The plaintiff's letter of May 13th informed the defendant of the mode in



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which they were directed. The acceptance and payment of the draft are decisive proof of the defendant's assent to this mode of direction, and rendered the sale complete at Olean. *Orcutt* v. *Nelson*, 1 Gray, 536. *Butler* v. *Hildreth*, 5 Met. 49. *Bayley* v. *Bryant*, 24 Pick. 198, 203. *Clement* v. *Jones*, 12 Mass. 60 *Chapman* v. *Morton*, 11 M. & W. 534. The defendant's subsequent acts, his endeavors to obtain the shingles, his speaking of them in his letters as his own, his neglect to make any complaint to the plaintiff or demand back the money which he had paid, so as to enable the plaintiff to make due and seasonable inquiry, and to assert his rights after their loss, are further proof of such assent and ratification. *Arnold* v. *Richmond Iron Works*, 1 Gray, 434. *Brigham* v. *Peters*, Ib. 139, 147. *Thayer* v. *White*, 12 Met. 343. *Allis* v. *Billings*, 6 Met. 415.

Dewey, J. The defendant accepted and paid a draft drawn by the plaintiff on him for the sum of $789.82. For this payment the defendant alleges he has received no consideration, and that this amount is justly due to him from the plaintiff; and he has filed this claim in set-off to the demand of the plaintiff. If he establishes his claim, such indebtedness may properly be made a subject of set-off under Gen. Sts. *c.* 130, § 3, as it will be a demand "for money paid, or money had and received," within the words of the statute.

It is conceded that this sum was paid under the supposition that the plaintiff had forwarded to the defendant a certain quantity of shingles that had been ordered by the latter. It is admitted, if all had been done by the plaintiff that was necessary to designate the person to whom and the place to which the same were ordered to be forwarded, the sale would have been complete at Olean, and he would have been discharged from further liability.

But it is said that the plaintiff failed to make a proper consignment of the shingles to the defendant, and forwarded them by a canal boat to be delivered to the Western Railroad Company at Greenbush, without naming the person to whom or the place where they were to be further conveyed by that company and that by reason of such omission the shingles remained

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at Greenbush for many days, and while thus there on storage were casually destroyed by fire.

We can have no doubt as to the duty of the vendor thus forwarding goods to his vendee, to furnish to the carrier to whom he commits the goods for transportation proper bills of lading and entries or marks indicating the person to whom and the place to which they are to be carried.

There was a failure in this bill of lading to name the consignee or his place of business or residence, or to give any indication to the Western Railroad Company who were to receive the goods, as to the place to which they were to be forwarded by them. This omission prevented the goods from being forwarded in the ordinary manner and time to the vendee, and eventually was the cause of their entire loss. Taking these facts alone, it would be quite clear that this loss should fall on the plaintiff, and that the money paid by the defendant was paid without consideration, and the defendant would be entitled to recover the same as money had and received to his use.

But it is urged that the defendant had the means of knowing of this omission of the name of the consignee and his place of residence before he accepted the draft, inasmuch as concurrently with it he received a copy of the bill of lading which the plaintiff had caused to be delivered to the master of the canal boat at Olean, and that he might have seen that there was upon it no name of a consignee, or place of his residence. To this it is answered that the defendant might reasonably assume that the proper directions as to the person to whom and the place to which the shingles were to be forwarded would be given in some form, and especially he might do so as the bill of lading was enclosed in a letter from the plaintiff, saying that the shingles were "shipped you this day as per your order." The order of the defendant was dated at Southampton. He also received his letters at Westfield, an adjoining town, and it was there that various previous consignments to the defendant of similar articles had been duly directed as the place of delivery.

The case of *Quimby* v. *Carr*, 7 Allen, 417, is very strong as to the point that the defendant should not suffer by reason of his

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not discovering an error which the plaintiff had made. The plaintiff has no right to assume that the defendant might not have failed, as well as himself, to notice this omission. To pass this property to the vendee there must not only have been a delivery of the same to the carrier, but it must be a delivery in accordance with the order of the person directing the goods to be sent to him. *Downer* v. *Thompson*, 2 Hill, (N. Y.) 137.

The omission of the plaintiff to forward the goods with proper directions as to the consignee and the place of delivery authorized the defendant to treat the alleged sale as one never perfected, and to recover back the money paid upon the draft of the plaintiff, founded upon such alleged sale and delivery of the shingles.

This right to treat the sale as a nullity was not lost by reason of the subsequent acts of the defendant in inquiring for the shingles at Westfield, writing to the agent of the Western Railroad Company at Greenbush, or by his letter of June 20th to the plaintiff. It does not appear that the defendant actually knew the reason why the shingles had not been forwarded to Southampton, until he was apprised by the letter of the agent of the Western Railroad Company of June 28th.

The delay in making a demand upon the plaintiff for reimbursement does not conclude the defendant, if his original right is clearly established.

This is a case of a loss originally occasioned by the negligence of the plaintiff; and as the plaintiff has been in no way prejudiced by the acts of the defendant subsequent to this failure of duty on his part, we see no sufficient ground to authorize a jury to find an assent on the part of the defendant to the manner in which the plaintiff had executed the order and forwarded the shingles. *Exceptions sustained.*

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## Abel Knapp & others *vs.* Asahel S. Abell.

A judgment of a court of general jurisdiction of another state may be proved by duly certified copies of all the papers in the case, with a like certified copy of a record entitled "judgment roll on failure to answer," which simply contains the names of the court, county and parties, with an affidavit of the plaintiff's counsel that no answer or demurrer has been served upon him, and, after reciting the service of the summons and copy of the complaint on one of the defendants, the failure to serve a demurrer or answer, and the assessment of damages by the clerk, sets forth that it was adjudged that the plaintiffs recover the said sum of the defendants with costs, and that execution issue against the sole property of the defendant upon whom service was made, and the joint property of both defendants; but such judgment, being rendered on default and without a service upon all the defendants, will not support an action in this commonwealth even against the defendant who was served with process, without proof that by the laws of that state such judgment might properly be rendered there.

Contract against Asahel S. Abell and Lucius D. W. Stone on a judgment of the supreme court of the state of New York. No service was made on Stone, and Abell defended alone.

At the trial in the superior court, before *Brigham*, J., without a jury, the plaintiffs offered in evidence a copy (which was annexed to the declaration in this case) of proceedings in a suit brought by them against Abell and Stone in the supreme court for the county of Clinton and state of New York, including a summons headed "Supreme Court, County of ——," and dated May 28th 1864, to answer the complaint served therewith, "and to serve a copy of your answer on the subscriber at his office in Mooers" within twenty days, and signed "Thos. Armstrong, plaintiffs' attorney, Mooers, N. Y."; a complaint, headed "Supreme Court, Clinton County," verified by oath of one of the plaintiffs on the same day, and alleging that the defendants were partners and the plaintiff sold and delivered to them goods to the amount of $1853.20, of which the sum of $1560 was still due; an affidavit of said attorney, headed "Clinton County, ss.," that he served upon Abell "at Champlain" on the same day the summons and complaint by giving to and leaving with him a copy thereof; and the following:

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"Supreme Court, Clinton County.

"Abel Knapp, Parsons A. Knapp and Horatio F. Knapp, Plaintiffs, against Asahel S. Abell and Lucius D. W. Stone, Defendants. } Judgment roll on failure to answer.

"County of Clinton, ss.

being duly sworn, says that he is plaintiffs' attorney in the above entitled action, and that no answer or demurrer to the complaint in said action has been received by plaintiffs' attorney.

"Thos. Armstrong.

"Sworn before me, this day of June 24th, 1864.

"John Shedden, Justice Peace.

"Judgment. June 28th, 1864.

"The summons, with a copy of the complaint in this action, having been personally served on Asahel S. Abell, one of the defendants, more than twenty days previous to this date, exclusive of the day of service, and no answer or demurrer to the complaint having been served on the plaintiffs' attorney, as required by the summons; and the clerk having assessed the amount due to the said plaintiffs from the defendants at $1594.07, the sum hereinafter mentioned —

"Now on motion of Thos. Armstrong, plaintiffs' attorney, it is hereby adjudged that Abel Knapp, Parsons A. Knapp and Horatio F. Knapp, the plaintiffs, recover of Asahel S. Abell and Lucius D. W. Stone, the defendants, the sum of fifteen hundred and ninety-four dollars and seven cents, with eighty dollars and forty-three cents costs and disbursements, amounting in the whole to sixteen hundred and seventy-four dollars and fifty cents, and that execution issue against the sole property of the said A. S. Abel and the joint property of both defendants.

"M. Chamberlain, Clerk."

Annexed was a certificate, entitled "State of New York, Clinton County, Clerk's Office," under seal of the court, and signed by its clerk, stating that he had "compared the foregoing copy of summons and complaint, proof of service, verification of complaint, proof of default and judgment, with the original summons,

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complaint, proof of service, verification, proof of default and judgment on file in this office, and that the same are true copies thereof and of the whole of said originals."

The defendant waived all objection to the authentication of this copy, but asked the court to rule that it was not competent and sufficient evidence of a judgment recovered which could be enforced against him in this action. The judge refused so to rule, and ordered judgment for the plaintiffs. The defendant alleged exceptions.

*W. Allen, Jr.*, for the defendant. The paper produced does not purport to be a record of any court. No presumption in its favor can arise until the faith and credit given to it by law or usage in New York are proved. It is simply a copy of certain original papers and certain minutes. A record must be enrolled and authenticated by a court. This paper does not import that any court was present; it names no term; it shows no judgment, but merely an act of the clerk in vacation. Jurisdiction of the persons of the defendants was not acquired. No legal process was proved. A mere notice from a party is not sufficient. There was no legal service. No service whatever was shown within the jurisdiction of the court. And the want of service on the defendant Stone is fatal to this action. *Hall* v. *Williams*, 6 Pick. 232. *Rangely* v. *Webster*, 11 N. H. 299. *Smith* v. *Smith*, 17 Illinois, 482. The judgment here was joint.

*S. T. Spaulding*, for the plaintiffs. The record was duly certified and proved. *Capen* v. *Emery*, 5 Met. 436. *Barringer* v. *King*, 5 Gray, 9. The judgment was rendered by a court of general jurisdiction. *Buffum* v. *Stimpson*, 5 Allen, 591. The form of process, and mode of service and entry of judgment were according to the laws of New York, as is implied by the record. *Buffum* v. *Stimpson*, 5 Allen, 591. *Carleton* v. *Bickford*, 13 Gray, 591, and cases cited. The judgment is therefore valid. *Hinton* v. *Townes*, 1 Hill, (S. C.) 439. *Ewer* v. *Coffin*, 1 Cush. 23. This defendant cannot object that there was no personal service on Stone. He could not either alone or with Stone maintain a writ of error to reverse the judgment as against Stone, or use Stone's name for that purpose without his consent. *Gay* v

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*Richardson*, 18 Pick. 417. It is a qualified judgment as to Stone, answering the purpose of our statute provisions for discontinuance as to an absent defendant. Gen. Sts. *c.* 126, §§ 13–15. *Haggerty* v. *Amory*, 7 Allen, 458. *Whitney* v. *Walsh*, 1 Cush. 29. *Shirley* v. *Shattuck*, 13 Met. 256.

Gray, J. This case presents for our consideration an important matter of practice, since in many of the United States, as is well known, the strict forms of the common law have been departed from, and files of papers or entries on a docket have been allowed to take the place and have the weight of a more formal record. *Washington, &c. Steam Packet Co.* v. *Sickles*, 24 How. 341. 2 Phil. Ev. (4th Amer. ed.) 360. We might almost adopt the words used by Lord Tenterden in speaking of courts in the English colonies, "If we were to require in the proceedings of foreign courts all the accuracy for which we look in our own, hardly any of their judgments could stand." *Henley* v. *Soper*, 8 B. & C. 20. It behooves us, therefore, to be careful not to allow our own regard for forms to induce us to refuse effect to a record of the action of the court of another state, which is sufficient in substance and contains all the essential requisites of a judicial record. The record of a case need not state all the proceedings in detail; it is enough that it shows the subject matter of the suit, jurisdiction over the parties, and the final judgment of the court. *Grignon* v. *Astor*, 2 How. 340.

It is settled beyond doubt that the laws of a foreign country or another state are facts, of which the courts of this commonwealth cannot take notice until they are duly proved. *Ennis* v. *Smith*, 14 How. 426, 427. *Haven* v. *Foster*, 9 Pick. 130. *Holman* v. *King*, 7 Met. 388. *Palfrey* v. *Portland, &c. Railroad*, 4 Allen, 56. Gen. Sts. *c.* 131, §§ 61–65. In *Cragin* v. *Lamkin*, 7 Allen, 395, the trustee's answer, upon which the case was submitted to the court, referred to the laws of Illinois, and it does not appear that any objection was made at the argument to the citations from the Illinois Reports as evidence of the law of that state. This bill of exceptions does not show that either party at the trial offered to prove the laws of New York; and no new evidence can be admitted at the hearing before this court on the exceptions to

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the ruling of the court below. We were therefore compelled to restrain the counsel from citing the statutes of that state as evidence of those laws at the argument, and are deprived of their assistance in deciding this case.

The defendant makes two objections to the sufficiency of the copy annexed to the declaration, and admitted in evidence at the trial: 1st. That it does not purport to be a record or judicial proceeding of any court; 2d. That it does not show that any court in New York had acquired jurisdiction of the person of the defendant.

In examining the paper produced, to see whether either of these objections is well founded, it is necessary to bear in mind the well established presumption in favor of the lawfulness and regularity of the proceedings of any court of general jurisdiction. County courts, courts of common pleas and circuit courts of another state have been held by this court to be courts of general jurisdiction, within the rule. *Bissell* v. *Wheelock*, 11 Cush. 279. *Carleton* v. *Bickford*, 13 Gray, 593. *Buffum* v. *Stimpson*, 5 Allen, 592, 593.

The caption of "Supreme Court, Clinton County" sufficiently shows that the court was one of general jurisdiction. It is not denied that the cause of action is sufficiently set forth in the complaint. The last part of the paper is entitled a "judgment roll on failure to answer," and sets forth a "judgment," which recites that the summons with a copy of the complaint has been personally served on the defendant Abell more than twenty days previously, that no answer or demurrer has been served on the plaintiffs' attorney, as required by the summons, and that the clerk has assessed the amount due to the plaintiffs; and thereupon declares that "it is hereby adjudged" that the plaintiffs recover of the defendants that amount and costs. This "judgment roll" is manifestly intended to be a record of a judicial disposition of the case. The omission to name any term is immaterial. The completeness of the record is shown by the certificate of the clerk that he has compared the various parts of the copy with the originals on file in his office, and that they "are true copies thereof and of the whole of said originals."

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The statement that "it is hereby adjudged" implies action of the judge, and not merely of the clerk. If the affidavit of service by the plaintiffs' attorney does not show that the place of service was within the jurisdiction of the court, the recital in the judgment that Abell had been personally served with a summons is *prima facie*, and, in the absence of anything to contradict it, sufficient evidence of service upon Abell, and, taken in connection with the further recital of his failure to answer, of default.

This defendant however contends that the judgment was wholly void for want of service upon the other defendant, and the cases which he cites show that such is the law when the judgment of the other state is entire and unqualified against both defendants. *Hall* v. *Williams*, 6 Pick. 232. *Rangely* v. *Webster*, 11 N. H. 299. By the existing law of this commonwealth, when several defendants are sued jointly on a contract, and part only served with process, the action may proceed to judgment against those alone, and the others remain liable to a new action upon the original contract; and this whether the original judgment is rendered within or without the state. Gen. Sts. *c.* 126, §§ 14, 15. *Shirley* v. *Shattuck*, 13 Met. 260. *Odom* v. *Denny*, 16 Gray, . The plaintiffs contend that, in the spirit of this law, the judgment of the New York court may be treated as a qualified judgment, binding on the defendant Abell, though not on the other defendant Stone. But the difficulty with this view is, that our law authorizes a judgment against no defendant who is not served with process; whereas this judgment is general against both defendants, and the qualification is only of the execution which may issue thereon. If, as the plaintiffs' counsel now suggest, the statutes of New York authorized a judgment in this form in such a case as this, it should have been proved at the trial. If it had been, this action might have been maintained. See *Catskill Bank* v. *Hooper*, 5 Gray, 585. But as it was not, we cannot judicially know or presume that the law of New York upon this point differs both from the common law and from our own. *Legg* v. *Legg*, 8 Mass. 101 *Thurston* v. *Percival*, 1 Pick. 417. Upon this bill of exceptions the judgment must therefore be *Exceptions sustained.*

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HENRY B. METCALF & another *vs.* CHARLES MUNSON & others.

For the purpose of proving a person's insolvency at a particular time, evidence is competent to show that a note signed by him was then outstanding, although its validity was denied by him, and it was afterwards disallowed in the court of insolvency.

An attachment of real estate may be proved by the entry thereof in the clerk's book of attachments, kept under Gen. Sts. c. 123, § 53.

Evidence that an insolvent debtor was reputed to be a man of large property at the time when a conveyance by him was made is admissible upon the issue whether the grantee had reasonable cause to believe him insolvent.

The Gen. Sts. c. 118, § 91, providing that if a conveyance of property by an insolvent debtor is not made in the usual and ordinary course of his business that fact shall be *prima facie* evidence that the grantee had reasonable cause to believe him insolvent, apply to conveyances made to preëxisting creditors as well as to other conveyances.

TORT, by the assignees of Benjamin Little, an insolvent debtor, to recover the value of a stock of furniture sold by him to the defendants on the 22d of September 1862.

At the trial in the superior court, before *Brigham*, J., it appeared that Little filed his petition in insolvency on the 31st of December 1862. He had kept a stock of furniture for sale at retail in Huntington, and the defendants, who were traders there, had usually a large account for goods sold to him and to persons in his employment, which he had been accustomed to settle at stated periods by giving his notes on time for the balances found due to them. On the 22d of September 1862 three such notes were outstanding, and not due, amounting together to $1185, which had been discounted upon the indorsement of the payees. In consideration of the sale of the furniture, the defendants agreed to pay these notes, and gave also other notes to him amounting to $670, and also some smaller matters were adjusted at the same time.

In order to prove Little's insolvency at the time of this transaction, the plaintiffs, after putting in evidence various notes which had been allowed against his estate, offered a note dated May 31st 1862, payable to Myer & Wondra, the signature to which was admitted to be in Little's handwriting; and one of the plaintiffs testified on cross-examination that it was offered for proof against Little's estate, but upon Little's objection that

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its date had been fraudulently altered it was disallowed in the court of insolvency. The defendants objected to the admission of this note in evidence, but the objection was overruled. The plaintiffs were also allowed, under objection, to introduce in evidence the entry, on the 19th of September 1862, of an attachment of Little's real estate purporting to have been made on the day before, in the clerk's book of records of attachments, for the purpose of proving that his real estate had been attached before the 22d of September.

The defendants offered to prove that Little was reputed in Huntington and its vicinity to be a man of large property, and to be the owner of valuable real and personal estate; but the judge excluded the evidence. Witnesses subsequently called were however allowed to testify that his credit and solvency were unquestioned until his failure in December, or shortly before that time.

The plaintiffs contended that the sale was out of Little's usual course of business, and therefore *prima facie* evidence, under Gen. Sts. *c.* 118, § 91, that the defendants had reasonable cause to believe him insolvent. The defendants contended that even if it was out of the usual course of his business, yet inasmuch as it was a sale to preëxisting creditors and indorsers it was governed by § 89, and not by § 91, and that the provision referred to in § 91 had no application to this case. The judge however ruled that the provision applied as well to cases under § 89 as to those under § 91.

The jury returned a verdict for the plaintiffs, and the defendants alleged exceptions.

*H. Morris*, for the defendants. The note to Myer & Wondra was so far impeached that it ought not to have been admitted to affect the defendants, who were not parties to it. The record of the attachment was not the proper evidence of the attachment. The evidence as to Little's reputation as a man of property should have been admitted. *Bartholomew* v. *McKinstry* 6 Allen, 567, and cases cited. *Whitcher* v. *Shattuck*, 3 Allen 319. *Simpson* v. *Carleton*, 1 Allen, 109. *Boardman* v. *Kibbee* 10 Cush. 545. The judge erred in ruling that the provision

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of Gen. Sts. *c.* 118, § 91, is applicable to a case like the present.

*J. Wells*, for the plaintiffs.

CHAPMAN, J. 1. The sale of property by Little to the defendants was made on the 22d of September 1862. In order to impeach it, the plaintiffs were obliged to prove, among other things, the insolvency of Little at that time. The existence of a note against him in favor of Myer & Wondra, dated May 31st 1862, would be pertinent evidence on that point. The fact that a note of that date, the signature of which was not denied, was in the hands of a person who claimed it as a creditor and attempted to prove it in the court of insolvency some months afterwards was proper to be submitted to the jury, notwithstanding the evidence that was drawn out on cross-examination tending to destroy its validity; for the jury must decide the matter upon all the circumstances of the case.

2. The entry in the book of records of attachments was competent evidence to prove the existence of an attachment of Little's real estate.

3. The evidence of the reputation of Little as to property ought to have been admitted. On the question of what the defendants had reasonable cause to believe concerning the solvency of Little at the time of the sale to them, such evidence is pertinent, and is often entitled to great weight. It is of the same character with the evidence which was held to be admissible in the cases cited by the defendants' counsel.

4. The construction which was given by the presiding judge to Gen. Sts. *c.* 118, §§ 89, 91, is the same which they received in *Nary* v. *Merrill*, 8 Allen, 451. The court found some difficulty in construing these two sections, but are of opinion upon reconsideration that the construction given in that case was correct.

*Exceptions sustained.*

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## Park Hannum *vs.* Linus Tourtellott.

Under Gen. Sts. c. 123, § 54, Sundays and fractions of a day are excluded in reckoning the three days allowed for recording an attachment.

An officer's statement in his return of a levy of an execution upon real estate is not conclusive evidence of the existence or amount of an incumbrance thereon.

If a levy of an execution is made upon several parcels of land, some of which are subject to a mortgage and others not, they may all be appraised together, under Gen. Sts. c. 103, §§ 6, 33, and the amount due upon the mortgage deducted from the appraisement so made, provided that such amount is not greater than the value of the parcels which are mortgaged.

Tort in the nature of trespass *quare clausum.*

The following facts were agreed in the superior court: The plaintiff and the defendant each claimed title under a levy of an execution in his favor against Charles Hannum, and the only question was, which levy had precedence.

The attachment of the defendant upon his original writ was made on Friday, March 28th 1862, at one o'clock, P. M., and was recorded in the clerk's office on Tuesday April 1st, at a little after three P. M. The defendant in due course obtained judgment and execution, and the execution was levied upon four lots of Charles Hannum, including the *locus*, and the appraisers' certificate was as follows: "We have appraised all of said lots at the sum of eight hundred and fifty-five dollars and thirty-nine cents, from which sum we deduct the sum of seven hundred and forty-two dollars, being the value of a mortgage on said land from said Charles, and now in the hands of John Paige, leaving a balance of one hundred and thirteen dollars and thirty-nine cents to apply on this execution;" "and we have set off the same by metes and bounds to the said Linus Tourtellott." It was agreed, in case parol evidence was competent to prove the same, that the mortgage covered only three of the lots.

The attachment of the plaintiff was made on Monday, the 31st of March 1862, at five minutes past twelve o'clock in the morning, and recorded on the same day; and it was agreed, in case parol evidence was competent to prove the same, that the plaintiff's writ was filled up and the officer's attendance to serve

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the same procured on Sunday for the purpose of making the attachment immediately after midnight.

Judgment was rendered for the defendant, and the plaintiff appealed to this court.

*E. Dickinson*, for the plaintiff. The record of the defendant's attachment was not seasonably made. Gen. Sts. *c.* 123, §§ 51–54. The levy of the execution of Tourtellott was invalid by reason of the manner of making the appraisement. Gen. Sts. *c.* 103, §§ 1, 3, 5, 6, 17, 18, 33. *Jenks* v. *Ward*, 4 Met. 404. *McGregor* v. *Williams*, 10 Cush. 526. *Bond* v. *Bond*, 2 Pick. 382. *Fletcher* v. *Stone*, 3 Pick. 250.

*C. Delano & S. T. Spaulding*, for the defendant.

Dewey, J. The question of title here arises between creditors levying upon the same real estate of the debtor. The attachment made by the defendant was first in point of time, unless lost by the omission to leave at the clerk's office the writ or a copy thereof, with the attachment indorsed thereon within three days after the day on which the attachment was made, as required by Gen. Sts. *c.* 123, § 54. The objection taken is, that the filing in the clerk's office was on the fourth day after the attachment. But as it appears that one of the three days immediately succeeding the attachment was Sunday, that day is to be excluded from the computation. When the time limited for such an act is less than a week, Sunday is to be excluded from the computation. *Thayer* v. *Felt*, 4 Pick. 354. *Penniman* v. *Cole*, 8 Met. 496.

It is then objected to the defendant's levy of execution that the same is invalid. It is said to be so because it was a levy made upon four distinct parcels of real estate, three of which were subject to a certain mortgage, and the other lot was unincumbered; and that the appraisement was of the four lots in one sum, and no deduction for the sum due on the mortgage was made from the aggregate, which included the unincumbered lot.

The defendant denies the competency of any evidence offered to establish these facts, insisting that the return of the officer is conclusive, and that by his return all the lots appraised are stated to be incumbered by the mortgage, which is deducted

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from their appraised value. But we are not satisfied that this position can be maintained. The return of an officer of a levy of execution is doubtless conclusive as to the formalities attending such levy, the notice to the parties, the selection of the appraisers, their qualifications, &c. But whether the premises are incumbered by a mortgage, and the amount of the incumbrance, and whether the deduction on that account was not too large, may be considered as matters open to proof. In *Mc Gregor* v. *Williams*, 10 Cush. 526, such evidence was admitted, and upon proof of a material over estimate of the incumbrance, and too large a deduction, the matter was treated as open to inquiry, and the levy was held invalid. In *Jenks* v. *Ward*, 4 Met. 404, a like inquiry was permitted.

It is conceded, if such evidence is competent, that in fact only three of the lots were included in the mortgage. The inquiry then is, whether upon this state of facts the levy can be maintained.

The Gen. Sts. *c.* 103, § 6, have directly provided that when the execution is levied at the same time upon several pieces of land, all the pieces may be appraised together. The uniting of four distinct parcels of land in one estimate as the appraised value of the land taken is not therefore objectionable. Such was the law as held by this court even before this statute.

But it is insisted that the deduction of the mortgage incumbrance should have been made from the appraised value of the three lots mortgaged, and hence results a necessity for a separate valuation of those lots. Such a mode of making the levy would obviously exhibit more directly the precise value of the lands incumbered, and the proportion it bore to the sum due on the mortgage, and would be unobjectionable. But the inquiry is, whether the levy is invalid because not so made. How is the debtor damnified by the mode that was adopted? Suppose the one lot not included in the mortgage had been appraised separately, and the three other lots appraised together, and the mortgage debt deducted from the value of those three lots; how would it differ in its results practically? The sum remaining to be applied on the execution would be precisely the same. The

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debtor's right to redeem from the levy would be the same, and no greater. It has long since been held by this court that a debtor would have no right to redeem one of several parcels set off on an execution. *Bond* v. *Bond*, 2 Pick. 382. He could not therefore have redeemed the unincumbered lot separately, but must have paid the whole sum at which the entire land was appraised and set off to the creditor, giving the same effect to the levy that follows from the appraisement of the four lots together.

There has been no suggestion in the present case that the sum deducted on account of the mortgage was greater than the value of the three lots included in the mortgage. Had such a case been shown, it might have presented a different question. The effect of a deduction beyond the value of the lots mortgaged might operate to prevent the unincumbered land from being made available to its whole value in discharge of the execution, as it ought to be. It is not necessary to decide that question here.

But where the deduction on account of the mortgage does not exceed the value of the lots mortgaged, it would seem to be quite immaterial to the debtor whether it is deducted from the appraised value of the four lots estimated together, or from the estimated value of the mortgaged lots.

Upon the facts stated in the present case, the court are of opinion that this levy was a valid one, and that the defendant has established his title to the premises.

This being so, the questions raised at the argument upon the point of the illegality of the plaintiff's judgment are of no importance as between these parties.

*Judgment for the defendant.*



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## Trustees of the Smith Charities *vs.* Inhabitants of Northampton & others.

A testator left a large estate to trustees, making provision for the selection by them of certain boys to be bound out as apprentices on certain terms and conditions, until their arrival at the age of twenty-one years, each of whom, at any time within six years thereafter, if he should have conducted himself well and faithfully meanwhile, should at the discretion of the trustees receive a loan of money from the income of the trust fund, not exceeding five hundred dollars, for a term not over five years, on his furnishing good security for the repayment of the same at the expiration of said term, with interest; and providing further, that if at the end of said term the interest should have been punctually paid, and the conduct of the borrower should have been such as to satisfy the trustees that he would in future make a good use of the money, the obligation should be cancelled and given up, without the payment of the principal. *Held*, that the trustees have no authority to cancel and surrender, without the payment of the principal, any such obligation to the legal representatives of a borrower who has died before the expiration of five years from the time of the loan to him.

A testator, in devising an estate to trustees for charitable purposes, provided that the trustees should be elected annually as follows: that eight towns, which were named, should annually choose in town-meeting one elector each, who should meet and elect by a majority vote three trustees. Until after the testator's death, a majority had always been necessary for the election of public officers in Massachusetts. *It seems*, under these circumstances, that a majority is required for the election of a trustee, although other officers are now elected by a plurality.

Bill in equity by the trustees of the Smith Charities, seeking instructions upon certain points arising under the will of Oliver Smith.

Concerning the first point decided by the court, the facts are sufficiently set forth in the opinion.

Concerning the second point, the bill alleged that the plaintiffs are a corporation, established under *St.* 1849, *c.* 96, for the purpose of dispensing certain charities under the said will; that the testator provided for the due election of a board of trustees thus "And I hereby order and direct that the said board of trustees shall be appointed and constituted in manner following: The several towns of Northampton, Hadley, Hatfield, Amherst and Williamsburgh in the county of Hampshire, and Deerfield, Greenfield and Whately in the county of Franklin, shall annually, in the month of March or April, at a legal town-meeting (an article to that effect being inserted in the warrant therefor,

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choose one person, being an inhabitant thereof, as agent for said town, to be called an elector. And the several electors thus chosen, such choice being duly certified, shall meet at Northampton on the first Wednesday in May annually; and shall then and there elect, by a majority of the votes given in, three suitable persons to act as trustees of said funds; and the persons thus elected shall constitute the board of trustees; and shall hold their office for one year, and until others are chosen in their stead."

The bill further alleged that in May 1864 two persons appeared at the meeting of the electors, each claiming to be the elector of Deerfield, one of whom had been chosen by a plurality vote, and the other by a majority vote, at a subsequent meeting; and that grave doubts had arisen respecting the true construction of the will in this respect, and the trustees had voted to ask the opinion of this court thereon.

The various towns named and the attorney general were made defendants. The will was proved in 1847. The case was reserved for the determination of the whole court.

*C. Delano*, for the plaintiffs.

No counsel appeared for the defendants.

Bigelow, C. J. Upon one of the questions stated in the bill, which has arisen in the course of the administration of the trusts committed to the plaintiffs, we entertain no doubt of the power or duty of this court to give to the trustees the aid and direction which they seek. Whenever a doubt or difficulty exists in the disposition of funds held by trustees, arising from the ambiguity of a will or other instrument by which the trust is created, or from an omission by a testator or settlor to make clear and adequate provision for all the contingencies which may arise in the practical administration of a trust, a court of equity may be properly called on by trustees to explain and interpret that which is obscure, and make certain by judicial exposition that which is doubtful, in order that they may be duly protected in the performance of their duties, and the rights of all parties interested in the trust may be properly guarded and secured.

By the allegations in the bill, it appears that a doubt has

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already arisen and is likely again to occur concerning the extent of the authority of the trustees in the disposition of a certain portion of the trust funds in their hands, and that they cannot proceed in the performance of their duty with safety or a due regard to the rights and interests of the beneficiaries under the will, until this doubt is judicially solved. This part of the case seems to us to present a practical question arising in the course of the administration of the trust, which renders it proper for the court sitting in equity to hear and determine it.

This question may be stated thus: By a clause in the testator's will, he made provision for the selection of certain boys by the trustees, to be bound out as apprentices on certain terms and conditions by him specified, until their arrival at the age of twenty-one years, and in relation to the boys thus selected and bound out he made this further provision: "Each of said boys who shall have been bound out as aforesaid, and who shall apply therefor at any time within six years after his arriving at the age of twenty-one, and who shall have conducted himself well and faithfully during his apprenticeship, and also until the time of such application, shall at the discretion of said trustees receive a loan of money from the income of this fund, not exceeding five hundred dollars, for a term not over five years, on his furnishing good and satisfactory security for the repayment of the same at the expiration of said term, with the interest thereon annually. And if at the end of the said term the interest shall have been punctually paid, and the conduct of the borrower shall have been such as to satisfy the said trustees that he will in future make a good use of the money, the obligation shall be cancelled and given up without the payment of any further sum than the interest aforesaid."

In pursuance of this provision, the trustees have made loans to persons coming within the terms and conditions described in the will, and in the course of their duty will hereafter be constantly called on to make other loans of a similar charact. But it has already happened and is likely again to occur that meritorious persons to whom such loans have been made, and who have given to the trustees notes or obligations as directed

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by the will, have died before the expiration of the term of five years, having in all respects conducted themselves in such manner as to make it reasonably probable that after the lapse of said term of five years, had they lived, they would have been entitled to receive their notes or obligations cancelled as provided by the testator. In this class of cases, the trustees allege that, if they had been satisfied that it was within the discretion vested in them by the will, they should in some instances have felt it to be their duty to surrender and give up the notes or obligations held by them at the death of the beneficiaries to their heirs at law, legal representatives or appointees, without exacting payment thereof. It is on this point that the trustees seek the aid and direction of the court; that is, they seek to be advised whether it is within the due and proper exercise of the discretion vested in them under the will, to cancel and give up the notes or obligations in their hands to the heirs, representatives or appointees of said beneficiaries, in case of their death before the expiration of the term aforesaid, if the trustees should deem it just and equitable so to do.

This question is to be determined upon an interpretation of that part of the will which creates the particular trust under consideration. There is no other clause which has any bearing upon it. It is too clear to admit of doubt that we cannot, in the exercise of the power of judicial exposition, insert in the will any provision which the testator has omitted, or supply defects or reform or modify his scheme of charity, if it is plainly set forth and capable of execution. It is only where the objects and purposes of a charity are likely to fail in part or in whole, or they are left uncertain and indefinite, that a court of equity will appropriate funds in a manner not directed by the testator. On consideration of the clause of the will under which this question has arisen, it seems to us to leave no room for the exercise, by a court of equity or by the trustees, of any power not expressly conferred by the testator. The clause of the will is clear and explicit, and the intent of the testator is plain. The notes and obligations taken and received by the trustees for loans to the persons designated by the will, together with the

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interest which should accrue thereon, are to continue a part of the trust fund and be held as such by the trustees until the expiration of the prescribed term. It is then, and then only that the contingency arises on the happening of which the trustees, in the exercise of the discretion vested in them, are authorized to cancel and surrender the notes and obligations, and thereby to appropriate to the beneficiaries a certain amount of the principal of the trust fund in their hands. We cannot say that the contingency of the death of the beneficiaries during the term was not in the contemplation of the testator, and that he did not *ex industria* intend to exclude it by omitting any provision that on the happening of such event the trustees might exercise a discretion as to the surrender of the obligations held by them to the heirs or other representatives of the deceased. In an instrument so carefully drawn and so full of details as the will of the testator, it is difficult to believe that an omission to provide for an event so probable and frequent as the death of some of the beneficiaries, during the existence of loans to them, was likely to be, should have escaped his attention. The more probable inference is, that he intended to fix an absolute, definite term of time during which the habits and conduct of the objects of his bounty should be thoroughly tried and tested, until the expiration of which no right to the enjoyment of the principal should accrue to any one. We are therefore of opinion that there is no discretion vested in the trustees as to the disposition of the notes and obligations which they may hold under the clause above cited, except that which they are expressly authorized to exercise at the expiration of the time specified in the will.

This is not a case for the application of the doctrines of *cy pres*, because there is no failure of the objects and purposes for which the fund was established, and no uncertainty as to the mode of its application. It is not a case of a mixture of a trust and power, where the court can be called on to aid a defective or improper execution of a power. The testator did not merely sketch the outline of the trust which he created, and leave the full extent of its operation to be filled up at the discretion

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of the trustees. The trust and the power are distinctly defined and limited. Nor is it a case where the will contains a provision of forfeiture, or in the nature of a forfeiture. The testator contemplated loans which were to be made on certain terms, and which were to be repaid, except on the happening of a certain contingency expressly declared and specified.

Upon the other question stated in the bill, on which the trustees seek for aid and advice, we entertain great doubts whether such a case is stated as to render it proper for us to express an opinion. Not only is there no actual question now raised as to the mode of choosing electors under the third section or clause of the will, but it is not made to appear that, if raised, it would seriously hinder the trustees from the proper discharge of their duties, or prevent in any respect the due and orderly execution of the trusts. This part of the bill rests not upon any existing fact, nor upon any allegation that the question suggested is certain to arise. It is founded solely on an apprehension that at some future period delays, inconveniences and embarrassments may be occasioned by an event which has already occurred once, and may happen again at some uncertain period of time. See *Treadwell* v. *Salisbury Manuf. Co.* 7 Gray, 393, 414. But the graver difficulty is, that, as the case is now presented, we have no one made party to the bill who has a direct and immediate interest in the determination of the question. If the contingency should hereafter happen by which a person should claim the office of elector by the choice of a plurality of votes, his right to claim the office could not be precluded by any adjudication which we may make in this case. In the expression of any opinion on the question now, we cannot undertake definitively to adjudicate upon it, so as to exclude its reconsideration hereafter.

But as this is a bill filed by the trustees of a great public charity, in which they express serious apprehension of difficulties which may arise in consequence of doubts which exist in the interpretation of the will, as to the mode in which electors are to be chosen, we do not feel at liberty entirely to withhold the expression of our opinion on the point submitted to us. Having regard to the fact that in all elections within this

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commonwealth at the date of the will, and of the death of the testator, a majority of votes was necessary to the choice of town, state and other officers, and that the testator, in the same section of his will, in prescribing the rule for the election of trustees by the electors, required that they should be chosen by a majority, we are strongly inclined to the opinion that he intended that the electors should be chosen according to the mode which then prevailed in all public elections, and which was sanctioned by law. In construing a will, it is always competent to arrive at the intention of the testator by having regard to the surrounding circumstances and existing facts at the time the will was made, which have a bearing on the subject matter of the provisions of the will.

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# CASES

ARGUED AND DETERMINED

IN THE

# SUPREME JUDICIAL COURT

FOR THE

## COUNTY OF HAMPDEN, SEPTEMBER TERM 1865, AT SPRINGFIELD.

PRESENT:

HON. GEORGE T. BIGELOW, CHIEF JUSTICE.
HON. CHARLES A. DEWEY, }
HON. REUBEN A. CHAPMAN, } JUSTICES.
HON. HORACE GRAY, JR., }

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### CHARLES O. NEWTON & another *vs.* SOLOMON A. FAY.

A bill in equity may be maintained to redeem shares in the capital stock of a corporation which have been transferred by an instrument absolute in its terms, upon parol proof that in reality the transfer was made only as collateral security for a debt.

CHAPMAN, J. This is a bill in equity to redeem certain shares of stock of the Otis Manufacturing Company and of the Springfield Fire and Marine Insurance Company, which the bill alleges were transferred by Jacob B. Merrick, the plaintiff's intestate, to the defendant, as collateral security for a note made by Merrick to the defendant. The answer admits that the defendant holds the stock of the Otis company as alleged in the bill, and there is no controversy in respect to that stock; but it denies that the stock of the insurance company was transferred to him as collateral security, and says that the conveyance of it to him by

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Merrick was intended to be an absolute sale or gift. On an issue framed to try this question before a jury, it appeared that the transfer of the stock was in the usual form of an absolute transfer, and the plaintiffs were permitted to prove by oral evidence that it was intended to be a security for the note, and was founded on no other consideration. The question now presented is, whether this evidence was admissible.

It is not contended by the defendant's counsel that the provision of Gen. Sts. *c.* 68, § 13, affects the question. That provision is, that "in transfers of stock as collateral security, the debt or duty which such transfer is intended to secure shall be substantially described in the deed or instrument of transfer. A certificate of stock issued to a pledgee or holder of such collateral security shall express on the face of it that the same is so holden; and the name of the pledger shall be stated therein, who alone shall be responsible as a stockholder." The obvious purpose of this section is to enable the pledgee to hold the security without being liable for the debts of the corporation or to taxation for the property; and if it were to be construed as excluding all other methods of conveying stock as collateral security, it would exclude evidence of a separate defeasance in writing. It was not framed with a view to that question, but altogether *alio intuitu*. It is to be noticed that it speaks of such a transfer of stock as a pledge, though the general property in the stock apparently passes to the vendee. The ordinary distinction between a mortgage and a pledge is, that by the former the general property passes, while by the latter it does not, but merely a special property passes. It is held in New York that a transfer of stock as collateral security is to be regarded as a pledge rather than a mortgage. The reason assigned is, that in order to constitute a pledge the possession must pass, and possession of stock cannot be transferred except by a transfer of the stock itself. A delivery of the scrip or certificate does not transfer the stock. The owner usually writes on his certificate a transfer very much like a bill of parcels, or a power of attorney to some one to make the transfer, and the papers which complete the possession in the vendee are made by the officers of the

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corporation. On account of this peculiar character of the property, it was formerly doubted whether it could be the subject of a pledge. But it is now held that it can be, and it is considered to be more in accordance with the intention of the parties to treat it as a pledge than as a mortgage. *Wilson* v. *Little*, 2 Comst. 443. *Allen* v. *Dykers*, 3 Hill, 593. *Dykers* v. *Allen*, 7 Hill, 497. *Vaupell* v. *Woodward*, 2 Sandf. Ch. 143. The same doctrine seems to be recognized in Pennsylvania. *Gilpin* v. *Howell*, 5 Penn. State R. 41. In New York it is also applied to the transfer and delivery of commercial paper. *White* v. *Platt*, 5 Denio, 269.

If regarded as a pledge, it is more in the nature of a trust than if regarded as a mortgage. The principal reason assigned for not regarding a mortgage as strictly a trust is, that the mortgagee has a property in the thing which he may make absolute in case the condition is not performed, by foreclosing the right of redemption. But the pledgee cannot do this. If the debt or duty is not discharged, he must avail himself of the security by selling the thing pledged, and not by foreclosure; and he holds the avails of the sale in trust to discharge the debt or duty, and, if any balance remains, to pay it to the pledger. Gen. Sts. c. 151, §§ 9, 10.

The practice of taking transfers of stock as collateral security is very general among all classes of business men and moneyed corporations; and in a large proportion of cases the transfer is absolute, and the purpose and consideration of the transfer are evidenced by mere oral agreement. The question raised in this case is, therefore, of great practical importance.

The rule relied on by the defendant, that parol evidence is inadmissible to prove that a sale or conveyance in writing which is absolute in its terms was not intended to be absolute, but was given as a pledge or mortgage, is well established in respect to actions at law, and this court have so held in *Harper* v. *Ross* *ante*, 332. It does not, however, apply to a bill of parcels. *Hazard* v. *Loring*, 10 Cush. 267. *Jewett* v. *Warren*, 12 Mass. 300 *Hildreth* v. *O'Brien*, *ante*, 104.

But this is a suit in equity, and it is therefore important to

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inquire what is the rule which courts of equity have applied to this subject. If a pledge or mortgage of property were to be regarded merely as a trust, the evidence would be admissible, for it is well settled that, since the statute of frauds as well as before, a trust of personal chattels may not only be created but if necessary established and proved by mere parol declarations. Hill on Trustees, 57, and cases there cited. Some of the cases are very strong. In *Kingsman* v. *Kingsman*, 2 Vern. 559, the defendant held property by an absolute legacy, and a trust was decreed on the strength of his admissions made in the presence of several witnesses. *Nab* v. *Nab*, 10 Mod. 404, is another strong case of the same character. But a mortgage is not regarded as strictly a trust, and no case has been found where the question has been discussed in respect to a mortgage or a pledge of a chattel. The cases which have come under discussion have been formal conveyances of real estate, and it seems to be well settled as a principle of equity jurisprudence in the courts of equity in England, in the United States courts, and in some of our state courts, that oral evidence is admissible in a suit in equity to prove that a conveyance of real estate, absolute in its terms, was intended as a security for a debt, or an indemnity against a liability, and that upon such evidence a decree of redemption will be made.

The policy of courts of equity has been from the earliest times to protect debtors, whom they regard as the weaker party, against being wronged or oppressed by creditors, whom they regard as the stronger party. Their method of interference has been by preventing the creditor from maintaining his title according to the legal effect of his conveyance whenever it was inequitable for him to do so. Therefore it was held in *Howard* v. *Harris*, 1 Vern. 190, that if a mortgage is made by its terms irredeemable, or the redemption is restricted, such restrictions are disregarded. In *Spurgeon* v. *Collier*, 1 Eden R. 55, the same doctrine was held, and Lord Northington said that a man will not be suffered in conscience to fetter himself with a limitation or restriction of his time of redemption. In *Vernon* v. *Bethell*, 2 Eden R. 110, parol evidence was admitted to prove that an

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absolute conveyance of an equity of redemption of real estate was made as security for a loan and for no other consideration, and the vendor was permitted to redeem. The court said that necessitous men are not, truly speaking, free men, but to answer a present exigency will submit to any terms that the crafty may impose upon them. When such parol evidence has been admitted, it has not been regarded as inconsistent with the statute of frauds. In *Walker* v. *Walker*, 2 Atk. 98, Lord Hardwicke said it had nothing to do with the statute of frauds. In *Kunkle* v. *Wolfersberger*, 6 Watts, 126, Gibson, C. J. said, the proof raises an equity consistent with the writing. It seems to be regarded as an inquiry into the consideration of the sale, for the purpose of doing equity between the parties. The rule on this subject and the reason of it are fully and clearly stated by Mr. Justice Curtis, in *Russell* v. *Southard*, 12 How. 139. He says: "To insist on what was really a mortgage as a sale is in equity a fraud which cannot be successfully practised under the shelter of any written papers, however precise and complete they may appear to be." He cites several English as well as American authorities to sustain this position. In the prior case of *Morris* v. *Nixon*, 1 How. 126, the same doctrine had been before held, and in *Babcock* v. *Wyman*, 2 Curtis C. C. 386; *S. C.* 19 How. 289; it was reaffirmed. The case of *Russell* v. *Southard* came up from Kentucky, and Mr. Justice Curtis says: "It is suggested that a different rule is held by the highest court in Kentucky. If it were, with great respect for that learned court, this court would not feel bound thereby. This being a suit in equity, and oral evidence being admitted or rejected not by the mere force of any state statute, but upon the principles of general equity jurisprudence, this court must be governed by its own views of those principles." But he cites the case of *Edrington* v. *Harper*, 3 J. J. Marsh. 355, where it was held that the fact that the real transaction between the parties was a borrowing and lending will, whenever or however it may appear, show that a deed absolute on its face was intended as a security for money, and whenever it can be ascertained to be a security for money, it is only a mortgage. Mr. Justice Story had held the same doctrine

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at a still earlier period. He held that parol evidence was admissible to show that an absolute deed was intended as a security for money, and that such a deed should be treated as a mortgage, whether the defeasance was omitted by fraud, mistake or accident, or by design, upon mutual confidence between the parties; for he says the violation of such an agreement would be a fraud of the most flagrant kind, originating in an open breach of trust, against conscience and justice. *Taylor* v. *Luther*, 2 Sumner, 228. *Jenkins* v. *Eldredge*, 3 Story R. 293. The same rule has long been held in New York and on the same ground. *Strong* v. *Stewart*, 4 Johns. Ch. 167, was decided by Chancellor Kent on the strength of several English authorities cited by him. See also *Slee* v. *Manhattan Co.* 1 Paige, 48; *Van Buren* v. *Olmstead*, 5 Paige, 9. In the latter case the rule is said to be well settled. After considerable discussion it was settled that the rule was limited to cases in equity, and did not prevail in courts of law. *Webb* v. *Rice*, 1 Hill, 606. *Hodges* v. *Tennessee Ins. Co.* 4 Selden, 416. But by the code parol evidence is made admissible both at law and in equity to show that an assignment, though absolute in its terms, was a security for a loan or an indemnity against a liability, and is therefore a mortgage. *Despard* v. *Walbridge*, 15 N. Y. 374. In *Wright* v. *Bates*, 13 Verm. 341, the court say: "It is well settled law in this state that a court of chancery will treat an absolute deed of real estate, given to secure the payment of a debt, as a mortgage, as between the immediate parties, especially if the grantor continues to remain in possession, though the defeasance rests wholly in parol." But where possession has followed the deed through several grantees, such evidence is held inadmissible. *Conner* v. *Chase*, 15 Verm. 764. And in this last case Williams, C. J. argues against the rule itself. In a note to 2 Cruise Dig. (Greenl. ed.) tit. xv. *c.* 1, § 20, it is said that "in Maine and Massachusetts the statutes recognize only two modes of creating a mortgage to which the chancery jurisdiction of the courts extends, namely, by proviso inserted in the deed, and by a separate deed of defeasance. All equitable mortgages created by contract of the parties seem therefore to be excluded. Relief, if any, in other

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cases must be referred to the head of fraud, trust, or accident and mistake." Since the publication of that work relief has been afforded under this head in a case where an absolute deed was alleged to have been intended as a security for a debt, and where the answer and proof showed the intention. *Howe* v. *Russell*, 36 Maine, 115. No case has arisen in this commonwealth where this court could consider whether it would adopt the rule of equity admitting parol evidence to prove that an absolute deed was given as security for a loan or for indemnity. For though the court has had jurisdiction of trusts for many years, yet the jurisdiction has been strictly construed, and has been held not to extend to trusts created by converting a fraud into a trust. *Mitchell* v. *Green*, 10 Met. 101. As a mortgage is not strictly a trust, but the element of fraud is held to enter into the attempt to convert it into an absolute sale, the court could not, prior to 1855, have entertained jurisdiction of such a case. The present case does not require us to decide whether the rule ought to be adopted here in application to a mortgage of real estate.

But in respect to the transfer of stocks, which requires but little formality between the parties, and is often made in the hurry of business, as a bill of parcels is made, and as to which a trust may be created and proved by parol, and which is to be regarded as a pledge rather than a mortgage, when used as a collateral security, we think the principle of equity jurisdiction so fully established elsewhere in regard to instruments much more formally executed ought to be adopted, admitting oral proof as to the consideration and purpose of the transfer, and that, upon the discharge of the debt or duty secured by it, the pledger should be permitted to redeem.

*Decree for the plaintiffs.*

*N. A. Leonard*, for the plaintiffs, cited *Hunnewell* v. *Lane*, 11 Met. 163; *Fletcher* v. *Willard*, 14 Pick. 464; *Alvord* v. *Smith*, 5 Pick. 232; *Hazard* v. *Loring*, 10 Cush. 267; *Champlin* v. *Butler*, 18 Johns. 169; *Kilpin* v. *Kilpin*, 1 Myl. & Keen, 520.

*H. Morris*, for the defendant, cited *Hazard* v. *Loring*, 10 Cush. 267; *Southwick* v. *Hapgood*, Ib. 119; *Rennell* v. *Kimball*, 5 Allen, 356; *Barker* v. *Buel*, 5 Cush. 519; *Walker* v. *Locke*, Ib. 90

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*Leonard* v. *Smith*, 11 Met. 330; *Howard* v. *Howard*, 3 Met. 548; *Flagg* v. *Mann*, 14 Pick. 477; *Barrett* v. *Wright*, 13 Pick. 45, *Crocker* v. *Crocker*, 11 Pick. 252; *Hunt* v. *Maynard*, 6 Pick. 489; *Flint* v. *Sheldon*, 13 Mass. 443; *Stackpole* v. *Arnold*, 11 Mass. 27; *Hale* v. *Jewell*, 7 Greenl. 435; *Lund* v. *Lund*, 1 N. H. 40; *Dean* v. *Dean*, 6 Conn. 285; *Meres* v. *Ansell*, 3 Wils. 275.

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## William L. Bemis *vs.* Cynthia Call.

If a woman mortgages her land to secure a debt of a third person, her subsequent marriage to the mortgagee will not extinguish the mortgage; but after his death his legal representatives may enforce it. Nor will the appointment of the mortgagee as administrator of the estate of the third person have this effect, if no funds come into his hands which can be applied to the payment of the mortgage debt.

In such case, the fact that during the marriage her husband undertook to foreclose the mortgage, and that he executed a will treating the mortgaged premises as his own, cannot legally prejudice her rights after his death.

A married woman cannot during coverture be barred of her estate, held without any limitation to her sole and separate use, by an *estoppel in pais*.

Writ of entry to foreclose a mortgage of land in Springfield.

At the trial in the superior court, before *Vose*, J., without a jury, it appeared that the defendant, on the 8th of April 1846, being then the wife of Azariah S. Waterman, executed jointly with him, and for the purpose of securing his note, a mortgage of the premises, which were then owned by her, to George Stebbins. Azariah died in 1850, without having paid the note. On the 10th of June 1852 Stebbins assigned the note and mortgage to Isaiah Call, by whom the amount due upon the note was paid to him; and on the 20th of said June, Call and the defendant were married. On the 10th of July following, Call was appointed administrator of the estate of said Azariah, and never represented the estate as insolvent; but all the assets of the estate were applied in payment of the expenses of his last sickness and funeral and charges of administration. On the 10th of June 1854, Call made an open and peaceable entry upon the

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premises for the purpose of foreclosure; and in November 1860 he died, leaving a will in which he devised all his real and personal estate in trust for the defendant during her life, and after her death to his heirs at law. The plaintiff is the administrator *de bonis non* of Call's estate.

The defendant introduced certain evidence tending to show that before her marriage to Call he promised to pay the mortgage debt if she would marry him, and afterwards both before and after the marriage stated that he had done so.

George Stebbins, called as a witness by the plaintiff, testified that Call came to him and inquired the amount due upon the note, and said he had money coming from Texas and would pay it; that he afterwards paid it, and wished to have the mortgage assigned, and said nothing of a discharge. The defendant objected to his testifying to acts and conversation of Call in her absence; but the judge admitted the evidence *de bene*.

James H. Call, son of Isaiah Call, was produced as a witness for the plaintiff, and his testimony was not objected to, it being understood by the defendant's counsel that his testimony would be received under the same objection made to the testimony of Stebbins; and he testified that he examined the mortgage note and assignment, which were brought by his father to him before the marriage; and that his father had no other real estate at the time of his death than the mortgaged premises.

The judge was not satisfied, upon all the evidence, that Isaiah Call, before his marriage to the defendant, agreed to pay the debt to Stebbins and extinguish the mortgage upon her land. The defendant asked the court to rule as follows:

"1. That the intermarriage of the testator, Isaiah Call, with the defendant, operated to discharge the mortgage and estop said Call or his representatives from enforcing it against her.

"2. That the appointment of Isaiah Call as administrator of Azariah S. Waterman operated to estop him and his representatives from enforcing said mortgage against her, especially when coupled with the fact that he never represented the estate of said Waterman to be insolvent.

"3. That the fact that Isaiah proposed to pay said mortgage,



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if she would marry him, and afterwards, both before and after the marriage, stated to the witnesses that he had agreed to pay the mortgage, with the further fact of the marriage, constitute a bar to this action.

"4. That no act of the defendant during the existence of the coverture can legally prejudice her in this action.

"5. That the fact that Isaiah undertook to foreclose the mortgage, and that he made and executed a will treating this as his property, cannot legally prejudice the defendant in this action."

The judge declined to make any of the rulings asked for, and directed conditional judgment to be rendered for the plaintiff. The defendant alleged exceptions.

*H. Morris*, for the defendant. 1. The marriage extinguished the mortgage. By this marriage Isaiah Call became entitled to redeem the mortgage, and also entitled to all the defendant's personal property, so that she no longer had the means of redeeming it. She could no longer make a valid contract with him, and could not pay him money on a debt. On the other hand, he became liable in law to pay her debts and to perform her covenants in the mortgage. 2. His appointment as administrator of the estate of Azariah S. Waterman estops him and his representatives to enforce the mortgage. 3. The fourth ruling asked for should have been made. Her acts while under coverture should not prejudice her. *Lowell* v. *Daniels*, 2 Gray, 161, 168. *McGregor* v. *Wait*, 10 Gray, 72. *Houghton* v. *Hapgood*, 13 Pick. 154. 4. The fifth ruling asked for should also have been made. These acts of Isaiah Call were not done with the defendant's consent; they were in support of his own interest; they were not the acts of one under whom the defendant claims title; but, so far as she is concerned, they were *res inter alios*. *Hunt* v. *Roylance*, 11 Cush. 117. *Long* v. *Lamkin*, 9 Cush. 366. *Bartlet* v. *Delprat*, 4 Mass. 702. *Aldrich* v. *Earle*, 13 Gray, 578.

*M. P. Knowlton*, for the plaintiff. 1. Prior to the marriage, Isaiah Call had a valid claim against the estate of Azariah S. Waterman, secured by the mortgage in controversy. The marriage did not extinguish that claim; and the mortgage still survived

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as collateral security. A mortgage is not necessarily discharged by assignment to the owner of the equity of redemption. *New England Jewelry Co.* v. *Merriam*, 2 Allen, 390. *Evans* v. *Kimball*, 1 Allen, 242. A tenant by the curtesy may redeem his wife's mortgage, and hold it as a claim against her estate. *Warren* v. *Jennison*, 6 Gray, 559, and cases there cited in argument. 2. The facts show that the mortgage debt was not and could not be paid from Waterman's estate; and under these circumstances it was not the administrator's duty to represent the estate as insolvent. Gen. Sts. *c.* 97, § 20. *Kinney* v. *Ensign*, 18 Pick. 235. 3. The fourth and fifth requests for rulings became immaterial by the general finding that no contract was proved. It does not appear that any injury resulted to the defendant from the refusal to adopt these rulings. 4. The agreement alleged to have been in consideration of marriage was void, because not in writing. Gen. Sts. *c.* 105, § 1. The marriage was not a part performance. *Dundas* v. *Dutens*, 1 Ves. Jr. 196. And there was no part performance by Call, because he did not do what it is contended that he contracted to do.

Dewey, J. The defendant insists that the marriage of the plaintiff's testator with her operated to extinguish this mortgage, and bar his representatives from enforcing it against her. But we find no authority for that position. The debt, for securing the payment of which this mortgage was given, was not her debt, and no personal liability to pay the same existed on her part. She had under the forms sanctioned by law conveyed the land then belonging to her to secure the payment of a promissory note of A. S. Waterman, her former husband. She was, at the time of her marriage with Isaiah Call, seised only of a right in equity to redeem the land upon condition of the payment of the debt secured by the mortgage. This marriage did not cancel that debt or the mortgage given to secure it. Although it might operate to prevent Call from instituting any legal proceedings to foreclose the mortgage during the continuance of the marriage relation, it did nothing more. The relation of husband and wife being dissolved by the death of Call, the mortgage may be enforced by his representatives against the defendant, or any person claiming to hold the land adversely to the mortgage.

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The acquisition by Call of an interest in the equity of redemption, by force of the marriage with the defendant, and also his rights as tenant by the curtesy, do not defeat the mortgage Although he might have the right to redeem, he was under no legal obligation to do so. His rights in this respect acquired by the marriage could have been no greater than his rights would have been as a purchaser from a third person of an equity of redemption, when he held an interest as the mortgagee. Such purchase of the equity of redemption by the person holding the mortgage does not extinguish the mortgage, or necessarily operate as a merger, where there is an intervening estate, or where it is for the interest of the purchaser to continue to hold the estate as mortgagee.

Nor does the appointment of Call as administrator of the estate of Waterman operate to defeat this mortgage and prevent the maintenance of the present action. The case finds that no assets came to his hands as administrator which could be applied to the payment of this or any other debt, excepting those of the class called privileged debts, and this is a sufficient answer, without entering upon the question of his duty to have applied the assets, had there been any, in payment of this mortgage and to the relief of the tenant.

The finding of the judge to whom the case was submitted by the parties conclusively settles all questions of fact, if no rule of law has been violated in the admission or rejection of evidence, or in the application of the evidence to the points in issue. Subject to this exception, we must assume, from the fact that the judgment of the court was rendered in favor of the plaintiff, that there was no actual payment of the debt secured by the mortgage, there being nothing to lead us to suppose that the court did not adopt the rule of law now so fully settled, that when nothing is found due, an action to foreclose a mortgage cannot be maintained.

Under the exception already stated, we must take the fact to be as found by the judge, that the evidence was insufficient to show that any contract was made by Call with the defendant prior to the marriage, that in consideration of her promise to

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marry him he would pay the debt and extinguish this mortgage; and this finding is an answer and a sufficient reason for refusing to adopt the third prayer for a ruling.

The only objection taken as to the admission of evidence was as to that of George Stebbins. Upon the statement of this evidence as detailed in the bill of exceptions, we see nothing in it that is objectionable, unless it be that some portions of it were wholly immaterial. It did not add to, vary or control the written assignment of the mortgage, under which Call held his title.

The evidence of James H. Call, if taken to have been received under objection, seems to be similar in this respect, and furnishes no sufficient reason for granting a new trial.

The fourth ruling asked for by the defendant was a proposition apparently too broad in its terms to require an unqualified assent thereto. If by it nothing more was asked than a ruling as to her sole acts, or to apply to the case the legal principle that a married woman cannot during coverture be barred of her estate, held without any limitation to her sole and separate use, by an *estoppel in pais* resulting from any acts of her own, it would be correct. *Lowell* v. *Daniels*, 2 Gray, 161.

But in reference to the fifth ruling in matter of law asked, "that the fact that the said Isaiah undertook to foreclose the mortgage, and the fact that he made and executed a will treating this as his property, cannot legally prejudice the defendant in this action," the ruling asked was correct, and should have been adopted by the court. *Aldrich* v. *Earle*, 13 Gray, 578. The ruling was called for by the evidence in the case, and precisely directed to the effect to be given to that evidence. The question of fact seems to have been decided upon the whole evidence, of which this was a part. Such being the case, the finding of the court was under an erroneous ruling in matter of law, and for this cause the exceptions must be sustained.

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## James M. Comins *vs.* Stephen G. Newton.

A rifle having a skeleton stock, at the time when a mortgage thereof was executed, is not so substantially changed by having a new wooden stock and a new and different kind of lock substituted for the original ones, by way of repairs, as to authorize an attaching creditor of the mortgagor to hold the same against the mortgagee, provided it is capable of being identified by parol evidence.

Tort for the conversion of a rifle.

At the trial in the superior court, before *Wilkinson*, J., it appeared that the plaintiff claimed title under a mortgage from Shubael Davis to him of a skeleton stock rifle; and the defendant, who was a deputy sheriff, claimed under an attachment upon a writ against Davis. The rifle described in the mortgage "was in the form of a pistol stock, with a metallic skeleton stock, and an under action lock," and, the lock being broken and in need of repairs, the mortgagor took it to a gunsmith and caused a wooden stock to be substituted for the other, and an over action lock to be put on the upper side instead of the under action lock. This was done with the plaintiff's knowledge. There was evidence tending to show that most of the parts of the rifle, except the barrel, were changed, and that the cost of the repairs was more than double the cost of a barrel of such external appearance.

The defendant asked the court to instruct the jury that if the article was so changed by new and material acquisitions of property not held by the mortgagor at the time of making the mortgage, and with knowledge of the mortgagee, as to render it incapable of identification by the written recital, the mortgage was void against an attaching creditor, and, if the changes which were made comprised a majority of its component parts and of its value, it should not be held under the mortgage. The judge declined so to rule, and instructed the jury that if the rifle was broken by accident and needed repairs, and the changes were in the nature of repairs, and were made in good faith, the plaintiff would be entitled to hold it under his mortgage, although it could no longer be called a skeleton stock rifle, provided the

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changes thus made did not so far destroy its identity as to make it substantially incapable of identification by parol evidence.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

*J. G. Allen*, for the defendant.

*M. P. Knowlton*, for the plaintiff.

BIGELOW, C. J. It is perfectly well settled that it is not necessary to the validity of a mortgage of a chattel that it should be so described as to be capable of being identified by the written recital, or by the name used to designate it in the mortgage. Parol evidence is admissible to show that a particular article of property was included within the general words of a description. *Harding* v. *Coburn*, 12 Met. 333.

The right of property in the mortgagee was not devested by the repairs and changes made upon the pistol in the hands of the mortgagor. The weapon was capable of identification as the one originally included in the mortgage; and, the repairs having been made in good faith, and not having changed the nature of the article or materially increased its value, there is no ground for holding that the plaintiff's lien upon it was defeated. *Putnam* v. *Cushing*, 10 Gray, 334. *Crosby* v. *Baker*, 6 Allen, 298. *Exceptions overruled.*

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MARY A. PRATT *vs.* BENJAMIN F. FARRAR.

A tenancy at will is determined by the execution of a written lease for a year by the owner of the premises to another tenant, although such lease contains a provision that no rent shall be claimed till the lessee is in actual possession.

Nearly forty-eight hours is sufficient time to allow for a tenant at sufferance to remove from the lower story of a house; and after the expiration thereof a process under Gen. Sts. c. 137, may be commenced to remove him.

ACTION under Gen. Sts. c. 137, to recover possession of the lower story of a house on Florence Street in Springfield.

At the trial in the superior court, before *Wilkinson*, J., on appeal from the decision of the magistrate, it appeared that on the

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29th day of March 1864 the premises were occupied by the defendant as tenant at will to Henry Dyer, the owner, who on that day executed a lease thereof to the plaintiff, "to hold for the term of one year from the 31st of March instant, yielding and paying therefor the rent of one hundred and fifty-six dollars. And the lessee does promise to pay the said rent in equal semi-annual instalments of seventy-eight dollars each, on the last day of March current for the first six months, and on the last day of September next for the succeeding six months; but no rent shall be claimed by the lessor until the lessee is in actual possession." A written notice of this lease was given to the defendant on the 31st of March, between twelve and one o'clock at noon, notifying him to give up the premises to the plaintiff on the 1st of April then next; and this action was commenced on the 2d of April. The defendant's wife was in feeble health, and his child at the time of the notice was sick with a fever, and continued under a physician's care for ten or twelve days thereafter; but these facts were not known to the plaintiff till after the commencement of this action.

Upon these facts, the judge ruled that the time allowed for the removal was sufficient, and that the action could be maintained; and the jury returned a verdict for the plaintiff accordingly. The defendant alleged exceptions.

*C. A. Winchester*, for the defendant.

*M. P. Knowlton*, for the plaintiff.

Gray, J. By the law of Massachusetts, as by the English common law, a tenancy at will may be terminated by alienation of the land either by landlord or tenant; and a written lease for years from the landlord to a third person has the same effect as a conveyance in fee. *Benedict* v. *Morse*, 10 Met. 229. *Kelly* v. *Waite*, 12 Met. 302, 303. *Howard* v. *Merriam*, 5 Cush. 574, 580. *Curtis* v. *Galvin*, 1 Allen, 216. *Cooper* v. *Adams*, 6 Cush. 90, 91. This form of expressing the will to end the tenancy, taking place off the land and in the absence of the other party, must be made known to him, in order to give effect to the intention and actually terminate the tenancy, although no particular form of notice is required. *Furlong* v. *Leary*, 8 Cush. 410 *Mizner* v.

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*Munroe*, 10 Gray, 292. *Doe* v. *Thomas*, 6 Exch. 857. *Pinhorn* v. *Souster*, 8 Exch. 770, 772. But upon such an alienation by the landlord, made known to the tenant, he becomes a tenant at sufferance, having no longer any estate or title, but a mere naked possession, without right, and therefore not entitled to any notice to quit, nor to any action against the landlord if he ejects him without unnecessary force. Cases above cited. Co. Litt 57 *b*. *Moore* v. *Mason*, 1 Allen, 407. The tenant would seem to be entitled to reasonable time to remove himself, his family and goods, and to remain or enter for that purpose, without being deemed a trespasser. *Rising* v. *Stannard*, 17 Mass. 287, 288. *Curl* v. *Lowell*, 19 Pick. 27. *Doe* v. *M'Kaeg*, *infra*. But his estate is terminated by the conveyance and notice thereof to him. The ruling at the trial was therefore sufficiently favorable to the defendant.

It may indeed be doubted whether the ruling was not too favorable, and whether, upon the defendant's estate at will being terminated by his knowledge of an alienation inconsistent with its continuance, the rightful owner might not at once maintain an action to recover the land. *McFarland* v. *Chase*, 7 Gray, 463. *Howard* v. *Merriam*, 5 Cush. 578. *Doe* v. *M'Kaeg*, 10 B. & C. 723, 724; *S. C.* 6 Man. & Ry. 621, 622. *Doe* v. *Turner*, 7 M. & W. 235.

But it is unnecessary to express a decisive opinion upon that; for we concur in the opinion of the judge who presided at the trial, that the defendant was allowed a reasonable time to remove himself and his family, under the circumstances of the case. The facts not being in dispute, what was reasonable time was rightly treated as a question of law. Co. Litt. 56 *b*. *Ellis* v. *Paige*, 1 Pick. 50; *S. C.* 2 Pick. 71, *note*. The written lease was made on the 29th of March, to take effect from the 31st, and was not suspended by the stipulation not to claim rent until the lessee should be in actual possession. The tenement was the lower story of a house in the city of Springfield. It does not appear that the defendant's wife's health was so feeble that she could not assist in removing, or that his child was too sick to be removed and it does appear that their state of health was

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unknown to the plaintiff until after he had brought this suit. Notice to deliver up the premises was given to the tenant about noon on the 31st of March, nearly or quite forty-eight hours before this action was brought; and the return day of the writ, the earliest at which judgment could be rendered against him for possession, even if he should not appear in the suit, was a week later. Gen. Sts. *c.* 137, § 6. The notice under consideration in *Ellis* v. *Paige*, above cited, was a notice given for the purpose of determining a tenancy at will, before the time necessary to determine such a tenancy by notice had been regulated by statute in this commonwealth, and was not measured by the same rules which are to be applied, after the estate at will has been otherwise lawfully terminated, to the commencement of process for the ejectment of a tenant at sufferance.

*Exceptions overruled.*

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PRESIDENT, DIRECTORS AND COMPANY OF THE CABOT BANK *vs.* DAVID WARNER & another.

A notice of the dishonor of a note sent through the post-office and duly received by the indorser is sufficient to fix his liability; but such notice, if made out by a notary public and signed by mistake with the name of the maker of the note instead of with his own name, without the authority of the maker, is insufficient.

CONTRACT against two indorsers of a promissory note signed by R. C. Searle as maker.

At the trial in the superior court, before *Rockwell*, J., it appeared that on the day of the dishonor of the note a notary public undertook to notify the defendants thereof. The defendant Warner lived in Springfield, where the note was payable; and the other defendant, Ladd, lived in West Springfield. The notice to Warner was correct in form, and was sent through the post-office, and reached him in due season. The notice to Ladd was signed by mistake with the name of "R. C. Searle, Notary Public and Attorney at Law." Searle was never a notary, and

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Ladd knew that the signature was not in his handwriting. The plaintiffs, however, offered to prove that Ladd was not misled thereby; but the evidence was rejected.

The judge ruled that neither notice was sufficient, and directed the jury to return a verdict for the defendants, which was accordingly done. The plaintiffs alleged exceptions.

*J. Wells & A. L. Soule*, for the plaintiffs. The notice to Ladd was sufficient in form, notwithstanding the error in the signature. See *Kilgore* v. *Bulkley*, 14 Conn. 362; *Smith* v. *Whiting*, 12 Mass. 6; *Carter* v. *Bradley*, 19 Maine, 62; *Cayuga County Bank* v. *Walden*, 1 Comst. 413; *Ontario Bank* v. *Petrie*, 3 Wend. 456; *Mills* v. *Bank of United States*, 11 Wheat. 431; *Cowperthwaite* v. *Sheffield*, 1 Sandf. R. 416; *Sussex Bank* v. *Baldwin*, 2 Harrison, (N. J.) 487. This notice was properly sent through the post-office. *Bank of Columbia* v. *Lawrence*, 1 Pet. 578. The receipt of the notices is sufficient, no matter how they were sent. *Bank of United States* v. *Corcoran*, 2 Pet. 121. *Dickins* v. *Beal*, 10 Pet. 572. *Bradley* v. *Davis*, 26 Maine, 45. *Manchester Bank* v. *Fellows*, 8 Fost. (N. H.) 302.

*H. Morris*, for the defendants. The notice to Warner was not properly sent. *Pierce* v. *Pendar*, 5 Met. 352. *Cabot Bank* v. *Russell*, 4 Gray, 170, and cases cited. The fact of its reception by Warner is immaterial. His liability depends on due diligence upon the part of the holder; not on his knowledge. *Wamesit Bank* v. *Buttrick*, 11 Gray, 387. *Shed* v. *Brett*, 1 Pick. 401, 407. *Stanton* v. *Blossom*, 14 Mass. 116. The notice to Ladd was fatally defective. A notice to an indorser must proceed from the holder or his agent, or some party to the note. *Harris* v. *Robinson*, 4 How. 346. *Chanoine* v. *Fowler*, 3 Wend. 173. *Stewart* v. *Kennett*, 2 Camp. 177. And evidence that Ladd was not misled was incompetent.

Dewey, J. The only objection taken to the notice to Warner of the non-payment of the note of Searle, indorsed by him, is that the notice was deposited in the post-office in Springfield, the indorser, Warner, being an inhabitant of Springfield, and the same being his place of business.

There is no doubt that in such a case the ordinary mode of

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giving notice is either personally or at his domicil or place of business. Such is the only mode, if the party giving the notice would make it certainly effectual to charge the indorser. In the case of a notice through the post-office to an indorser living in another town, the actual deposit of the letter in the post-office is sufficient notice to charge the indorser, and it is immaterial to the holder of the note whether the notice is actually received. But if the notice thus deposited in the post-office, directed to one dwelling in the same town, be in fact received by him personally in due season, it is equally obligatory upon him, whether it came to his hands through the post-office, or any other agency. It is said in Parsons on Notes, 483, "If the party addressed duly receives the notice, or if the jury can properly presume from the facts of the case that it was received, the mere manner in which it was sent is wholly immaterial."

If the notice, although left at an improper place, be in fact received seasonably by the indorser, it seems to be quite sufficient, as has been frequently held. *Bank of United States* v. *Corcoran*, 2 Pet. 121. *Bradley* v. *Davis*, 26 Maine, 45. *Hyslop* v. *Jones*, 3 McLean, 96. *Manchester Bank* v. *Fellows*, 8 Fost. (N. H.) 302.

The distinction between the different modes of giving notice is this: that where the holder and indorser reside in different places, the former, if he deposits the notice in the post-office in due season, has no further burden on him as to the actual receipt of it by the latter; but where both parties live in the same town, the sender of the notice is bound to show that it was actually received by the indorser in due season. This latter fact is affirmatively shown as to the defendant Warner. This is quite sufficient to show that due notice was given to Warner, no objection existing as to the form of the notice sent to him.

As to the other defendant, Ladd, a different question arises It is whether any notice sufficient in form was ever directed to Ladd. It does not call in question the sufficiency of the statement set forth in the paper preceding the professed signature by R. C. Searle, but the objection is that the paper purports to come from nobody having authority to act in the matter. Pro-

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fessedly it is from "R. C. Searle, Notary Public." But there was no such notary public. Neither was the signature in the handwriting of R. C. Searle, or any one by his authority. The failure to forward a proper notice was a mere mistake, but that may be not less fatal to its validity.

The notice to an indorser, to be effectual, must come from some proper party. This notice came apparently from the maker of the note, but really not from him, and was sent without his agency or authorized signature.

There has been some discrepancy in the rules stated upon the question as to who may give a notice to the indorser. But the better rule seems to be that notice may be by a holder of the note or bill, or his agent, or any person who is a party to it, and who would, on the same being returned to him, and after paying it, have a right of action upon it for reimbursement. *Chanoine* v. *Fowler*, 3 Wend. 173. *Stanton* v. *Blossom*, 14 Mass. 116. Story on Notes, § 303. 1 Parsons on Notes, 506.

It is perhaps unnecessary to decide whether a notice from the maker Searle would have been a good notice, as the signature was not his, nor given by his authority. It was in fact not signed by him, or by the name of any notary public.

The court properly rejected the evidence offered for the purpose of showing that Ladd understood from the notice that the note of Searle had not been duly paid. It is not enough that the indorser knew that the note had not been paid. The notice, to be effectual, must come from the legal source. *Stewart* v. *Kennett*, 2 Camp. 177.

The result is, therefore, that as to Ladd the notice was fatally defective, and the verdict in his favor was properly ordered, and as to him the exceptions are overruled; and as to Warner the exceptions of the plaintiff are sustained.

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ALVAH F. JENNINGS *vs.* EDWIN CHASE & others.

A promise by a debtor to make monthly payments upon certain of his overdue notes upon which his creditor has no security is not a good consideration for a promise by the creditor to forbear for a time to press for payment of another overdue note against the debtor, upon which there are indorsers; and such promise to forbear, on such consideration, will not discharge the indorsers.

CONTRACT against the indorsers of a promissory note, signed by R. C. Searle as maker and indorsed by the defendants and A. Bullens.

At the trial in the superior court, before *Wilkinson*, J., it appeared that the plaintiff, besides the note in suit, held several other overdue notes signed by Searle and indorsed by Bullens; and the defendants introduced evidence tending to show that after the note in suit became due Searle and Bullens promised to pay the plaintiff fifty dollars then and fifty dollars a month upon the notes of Searle which were indorsed by Bullens alone, provided he would let the note now in suit lie as long as these payments should continue; that the plaintiff agreed to this, and the first payment of fifty dollars was made and applied upon a note of Searle which was indorsed by Bullens alone, and the plaintiff did forbear for nearly a month to press for payment of the note in suit.

The judge ruled that this was not a valuable consideration for the agreement of the plaintiff, and directed a verdict in his favor, which was accordingly rendered; and the defendants alleged exceptions.

*G. M. Stearns*, for the defendants.

*A. M. Copeland*, for the plaintiff.

CHAPMAN, J. The legal principles which govern this case are well settled. If the creditor agrees with the principal debtor to extend the time of payment, without the knowledge and consent of the surety, the effect of such agreement is to discharge the surety. But it must be a valid agreement, such as can be enforced either at law or in equity. Of course it must be made upon a good consideration, or be under seal. *Oxford Bank* v

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*Lewis*, 8 Pick. 458. *Blackstone Bank* v. *Hill*, 10 Pick. 129 *Greely* v. *Dow*, 2 Met. 176. *Gifford* v. *Allen*, 3 Met. 255. *Abbott* v. *Tucker*, 4 Allen, 72. *Potter* v. *Green*, 6 Allen, 442. The same doctrine is held in New York. *Reynolds* v. *Ward*, 5 Wend. 501. *Gahn* v. *Niemcewicz*, 11 Wend. 312. *Hall* v. *Constant*, 2 Hall R. (N. Y.) 185. The decision of this court in *Oxford Bank* v. *Lewis* and *Blackstone Bank* v. *Hill*, in which it was held that the payment of interest in advance upon an overdue note did not discharge the surety, there being no agreement by the creditor to extend the credit for any definite time, was followed in Maine, in *Freeman's Bank* v. *Rollins*, 13 Maine, 202. But in the subsequent case of *Lime Rock Bank* v. *Mallett*, 34 Maine, 547, and 42 Maine, 349, it was held that the payment of interest in advance upon an overdue note is a valid consideration for an express agreement to extend the time for payment of the principal, though it is not of itself evidence of such an agreement. In *Chute* v. *Pattee*, 37 Maine, 102, it was held that an agreement to pay interest for a specified time after the note became due was a sufficient consideration for a promise to forbear. In New Hampshire the payment of interest in advance for a definite time is held to be a valid consideration. *Crosby* v. *Wyatt*, 10 N. H. 318.

The true principle which must govern all cases of this sort must be, that in order to constitute a valid consideration the promise of the debtor must be to do something which he is not already bound by his note or contract to do, or the act done by him must be something that he was not thus bound to do. Upon this principle, the payment of a part of the debt after it has become due, or a promise to pay a part of it at some future time, is not a valuable consideration. Chit. Con. (7th Amer. ed.) 51.

In the present case the payment was not on the note in suit, but on another note of the plaintiff against Searle, to which the defendants were not parties · and the promise of Searle was to make payments monthly on other notes to which the defendants were not parties. But the payment was an act which Searle was already bound to do, and the promise to pay was no more

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than he had already promised in the notes to which the promise applied, for all the notes were overdue. As to each of them there was no valuable consideration for the plaintiff's promise to forbear, and it could not be enforced by Searle either at law or in equity; therefore the indorsers were not discharged.

*Exceptions overruled.*

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## Peter Benoit *vs.* Inhabitants of Conway.

If the inhabitants of a town have by vote authorized their treasurer to borrow money for the adjustment of a state tax for the reimbursement of bounties to volunteers, and the tax has been adjusted without the necessity of borrowing money, his authority to borrow money under that vote thereupon ceases.

If a town treasurer without authority borrows money on the credit of the town, and gives his note as treasurer, and mingles the money with his own private funds, by depositing the same to his own credit in a bank where he keeps an account in his own name, and uses the whole fund indiscriminately for the payment of his own debts and the debts of the town, so that the borrowed money cannot be specifically traced as having been applied in payment of the debts of the town, the lender cannot maintain an action against the town for money had and received.

Authority in a town treasurer to borrow money on the credit of the town cannot be established by proof of a long continued practice of the town, by their treasurer, to borrow money and give and pay notes therefor, without any votes of the town, and at the end of each year to report to the town a list of the amounts borrowed and of the notes given and paid, and of the acceptance of such reports by the town; there being no such report of the borrowing of the money in controversy.

Contract, brought against the inhabitants of Conway to recover the amount of the following promissory note: "Conway, February 6, 1864. $2075. On demand, for value received, I, G. Edgerton, town treasurer, for myself or my successor in said office, promise to pay Peter Benoit or order two thousand and seventy-five dollars, with interest. G. Edgerton, Town Treasurer." There was also a count for $2075, money had and received.

At the trial in the superior court, before *Rockwell*, J., the plaintiff called the present clerk and treasurer of Conway, who produced the town records, which contained the following votes passed August 3d 1863: "Voted, that the town adjust and pay

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its tax required under the law to provide for reimbursement of bounties paid to volunteers, &c., approved April 29, 1863, as provided in section 9 of said law. Voted, that the town treasurer be authorized to borrow such sums of money as may be necessary for the adjustment of said tax, under the provisions of said law." The witness testified that Edgerton was town treasurer at the date of the note, and in March 1864 paid over to the witness, as successor to Edgerton, $3000; that no money was borrowed under the above vote, and none was necessary, the bounties having been adjusted with the state in December 1863; and that Edgerton was largely indebted to the town. The plaintiff also called Edgerton, who testified that he borrowed the money, and the town had it, and he gave the note as town treasurer; that he deposited the money received from the plaintiff in the Conway Bank, having added some more to it; that his account at the bank embraced the moneys of the town; that he then had money in the bank; that after paying such town orders as came in, he paid the balance remaining to the town officers; that he did not know as this money was borrowed particularly or expressly under that vote; could not say he had the vote in mind; that during that municipal year he borrowed several thousand dollars, as the records would show; and that he could not say that, in his transactions of borrowing money generally after that vote, he did it in pursuance of authority derived from that vote. On cross-examination, he testified that the tax was settled between the town and the state in November or December 1863; that he kept his bank account in his own name, and kept no bank account in his name as treasurer; that his bank account included his own account; that he had occasionally a little money of his own; did not keep it separate; his own money and the town money were blended in the account, and he could not tell how much of the deposit account was his own money, and how much belonged to the town; there was no distinction in deposits or checks, in the bank account, between his private money and money of the town; and the payments made to the town officers did not settle his account with the town. On reëxamination he testified that he considered the bank



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account as the town's money, and that it was kept by him as the town account with the bank; though he could not say but some of it was his individual money.

The defendants put in evidence Edgerton's bank book, which showed a balance to his credit of $1954.52, prior to the deposit of the money received from the plaintiff. There were several other items upon both sides of this account, some of which Edgerton recollected, and of others he had no particular recollection, either of the sources from which the money came, or of the purposes to which the money drawn out on checks was applied.

The plaintiff offered to prove that for twenty years or more the practice of the defendants had been to borrow money, through their treasurer, of the bank and individuals, and give and pay notes by him, without any votes of the town, and at the end of each year to report to the town a list of the amounts borrowed, and of the notes given and paid, which reports were accepted by votes of the town; and that for the year ending in March 1864 such a report, giving the names of individuals of whom money was borrowed, and to whom notes were given and paid, was made by the treasurer to the town, and accepted by a vote of the town; and that, though the note now in suit was not included in this report, it should have been, and was omitted purely by mistake. This evidence was excluded.

The plaintiff thereupon rested his case, and the judge directed a verdict for the defendants, which was returned accordingly; and the plaintiff alleged exceptions.

*E. D. Beach*, (*G. M. Stearns* with him,) for the plaintiff. The treasurer's authority to borrow money under the vote did not necessarily terminate with the adjustment of the tax in December 1863. The object of the vote was to meet the demand of the state by loans to be carried to the next season. The defendants are liable on the count for money had and received. *Brown* v. *Harris*, 2 Gray, 359. *Melledge* v. *Boston Iron Co.* 5 Cush. 170. *Dill* v. *Wareham*, 7 Met. 447. Depositing the town's money in Edgerton's name was not such a mingling as to leave the ownership doubtful. The evidence offered showed that

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Edgerton had been held out as agent of the town, with authority to borrow money.

*G. T. Davis & C. Allen*, for the defendants, cited *Lowell Five Cents Savings Bank* v. *Winchester*, 8 Allen, 109; *Thayer* v. *Boston*, 19 Pick. 511; *Le Breton* v. *Peirce*, 2 Allen, 8; *Atlantic Bank* v. *Merchants' Bank*, 10 Gray, 560; *Lime Rock Bank* v. *Plimpton*, 17 Pick. 161; *Mason* v. *Waite*, 17 Mass. 560.

Bigelow, C. J. The evidence was insufficient to charge the defendants on the note declared on.

1. The money was not in fact borrowed under the authority of the vote. Edgerton so testified; nor could it have been, inasmuch as the necessity for the loan contemplated by the terms of the vote did not arise. No money was required by the town for the reimbursement of bounties paid to volunteers.

2. It does not appear that the money borrowed of the plaintiff, or any part of it, went to the use of the town. On the contrary, it was mingled with the private funds of the treasurer, and the evidence shows that it may have been used to pay his individual debts.

3. The evidence of usage was immaterial. It did not show that the town had ever sanctioned by their votes the borrowing of money in their name and on their credit by the treasurer, which did not go to the use of the town, but which was mingled with the treasurer's private funds and the appropriation of which for the use of the town did not appear. Besides; the usage went no farther than to show that the town, on the rendition of the treasurer's annual account, was accustomed to give its sanction to acts of the treasurer in borrowing money and giving and paying notes in behalf of the town during the year previous. This did not prove any authority in the treasurer to give notes binding on the town, but only a usage to sanction his acts in managing the financial concerns of the town, if, on hearing his statement at the end of the year, they met with approval. No such sanction was given to the transaction with the plaintiff, by which he obtained the note declared on; nor was the town bound by their previous usage to acknowledge the validity of the note. *Exceptions overruled.*

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## Emery Butterfield *vs.* Western Railroad Corporation.

A traveller upon a highway which is crossed by a railroad on a level, who knows that he is near the crossing and yet does not look up to see if a train is coming, simply because there is a storm and the travelling is bad, is guilty of such negligence that he cannot recover damages for an injury sustained by him from a collision with a passing train, although the bell was not rung nor the whistle sounded.

Tort to recover damages for a personal injury received by the plaintiff by being run over by the defendants' locomotive engine. At the trial in the superior court, before *Russell*, J., a verdict was returned for the plaintiff, with $1500 damages, upon facts which are sufficiently stated in the opinion; the judge having declined, on motion of the defendants, to rule as matter of law that the plaintiff had shown such carelessness as to deprive him of his right to recover. The defendants alleged exceptions.

*W. G. Bates*, (*M. B. Whitney* with him,) for the defendants.

*E. B. Gillett*, for the plaintiff.

Chapman, J. This case does not come before us upon a motion to set aside the verdict because it was against the evidence or the weight of the evidence, but upon exception to the refusal of the presiding judge to instruct the jury that there was no legal and sufficient evidence to authorize them to find a verdict for the plaintiff.

It is admitted by the plaintiff's counsel that the burden was on him to prove that he used due care to avoid the collision by which he was injured. By due care is meant reasonable care, adapted to the circumstances of the case. The crossing of a place known to be so dangerous as a railroad track frequently is by reason of the passing trains reasonably requires a high degree of watchfulness and attention. Before attempting to cross, a man should make a reasonable use of his sense of sight as well as of hearing, in order to ascertain whether he will expose himself to a collision. If he fails to use his senses without reasonable excuse, he fails to use reasonable care. *Shaw* v *Boston & Worcester Railroad*, 8 Gray, 73. *Warren* v. *Fitchburg Railroad*, 8 Allen, 227. *Commonwealth* v. *Fitchburg Railroad ante*, 189. *Stevens* v. *Oswego Railroad*, 18 N. Y. 422.

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In *Toomey* v. *London, &c. Railroad*, 3 C. B. (N. S.) 146, it is said that a mere scintilla of evidence is not sufficient to authorize a judge to submit the question of the defendants' negligence to a jury; but there must be evidence upon which a jury may reasonably and properly infer that there was negligence on his part. This rule of evidence is substantially the same with that laid down in *Denny* v. *Williams*, 5 Allen, 1, and applies with as much force to the plaintiff's proof of due care on his part as to the proof of negligence on the part of the defendant. See also *Philadelphia Railroad* v. *Hummell*, 44 Penn. State R. 375; *Wilds* v. *Hudson River Railroad*, 24 N. Y. 430.

All the evidence as to what the plaintiff did comes from his own testimony. He states, in substance, that on the 30th of January 1862 he started from the depot in Westfield to go on foot to his own house in a westerly direction. He was well acquainted with the highway and railroad. He attempted to cross the railroad without looking or intending to look to see whether a train was coming, and as he stepped upon the track he was struck by a train that was passing at that moment.

He admits that if he had looked he would have seen the train. It came from the west, and for half a mile west of the highway the track was in plain sight. As he approached the crossing the highway was for a considerable distance near to the track, and nearly upon the same level with it, so that the approaching train would be directly before him. As the way turns to cross the track it rises a little. It was dark, but the engine had a head light, which he could not have failed to see if he had looked.

He also knew that a train was due from the west about that time, and that it had not passed, and he supposed it must be near.

He states his reasons for neglecting to look. It was a stormy night, raining, blowing hard from the northwest, and snowing some. He had his hand up, holding his hat on his head, and this prevented him from seeing the train. The travelling on the highway was very bad; considerable snow had fallen sometime before, and its surface was frozen; the road had been ploughed out to the crossing, and the crust had slipped back into the path

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The ice did not fall over, but slid right back. He could not tell which furrow he walked in; sometimes one, and sometimes the other. He was listening for the cars; his attention was called to the subject, and he expected to hear the bell or the whistle, but there was no bell sounded or whistle blown.

From this statement it is to be inferred that he had occasion to use his eyes pretty constantly for the guidance of his own footsteps as he walked, and that he was under the necessity of obstructing his sight for the purpose of preserving his hat from being blown away. Yet as he had the control of his own movements, and could stop or check his speed at pleasure, it was in his power to look up frequently, and he might easily have seen the train. The noise of the wind and storm and the breaking of the snow crust as he walked must have made it more difficult than usual to hear the noise of the train, and furnished no excuse for trusting exclusively to his sense of hearing.

We must assume it to be true that neither the bell nor whistle was sounded, and that the defendants violated their duty in this respect. A traveller has a right to expect that they will perform this duty; and has some right to expect that he will hear the noise. But this expectation does not excuse him from exercising reasonable care to ascertain by sight as well as hearing whether there is a train coming immediately upon him as he attempts to cross the track. The negligence of the company does not authorize him to maintain an action, if he also is negligent. He states that he did not know when he came upon the track, although the snow was entirely removed from it. But he had known for a considerable time that he was coming near it; he knew of the rising ground, and the train had been in plain sight for a considerable time.

The plaintiff's neglect to use his eyes was palpable negligence, and he states no reasonable excuse for it. The jury ought therefore to have been instructed that he had offered no evidence of due care on his part, and was not entitled to a verdict.

*Exceptions sustained.*

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## Reuben Fox *vs.* Enoch Sackett.

If, in an action to recover damages for an injury sustained from a collision with a wagon left standing in a highway by the defendant, the evidence shows that the plaintiff had seen the obstruction there on the day of the accident, that he was accustomed to drive horses, and that the accident happened while he was driving a gentle horse in a dark evening on a slow trot, looking out on one side of the horse for a blanket which he had shortly before lost from his wagon, and his companion was looking for the blanket on the other side, and neither of them saw the defendant's wagon before the collision, it cannot be held as a matter of law that the plaintiff was so careless as to preclude his recovery, but the question should be submitted to the jury.

Tort to recover damages for an injury to the plaintiff's person and property, sustained by coming in collision with a wagon left by the defendant in a highway in Westfield.

At the trial in the superior court, before *Wilkinson*, J., it appeared that on the 2d of November 1860, at the place of the accident, which was opposite to the defendant's barn, the highway was twenty-six feet wide, with a steep bank on the east side and a fence on the west. At the foot of the bank there was a pile of wood, and two large wood wagons stood west of the pile, the wheels of which were in the road. On the west side of the road there was a quantity of old timber. It was not disputed, at the argument, that these obstructions were put there by the defendant.

On the evening of the day referred to, the plaintiff, who was accustomed to drive horses, and was acquainted with the road, and had seen the wagons in it that afternoon, passed by in a wagon, driving a gentle horse, accompanied by one Meacham, on his way to Granville. When about a quarter of a mile past the place of the accident he missed a blanket, with a white lining, from his wagon, and drove back to look for it. The evening was dark. He drove back on a slow trot, Meacham looking out for the blanket on the west side of the horse, and the plaintiff on the east side. He did not see the wood wagons until the collision from which the injuries were received.

Upon this evidence, the judge ruled that the plaintiff had failed to prove that he was in the exercise of due care, and

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directed a verdict for the defendants, which was accordingly rendered; and the plaintiff alleged exceptions.

*W. G. Bates & M. B. Whitney*, for the plaintiff.

*N. T. Leonard & E. B. Gillett*, for the defendant.

Bigelow, C. J. It seems to us that there was positive evidence in this case of due care on the part of the plaintiff, which ought to have been submitted to the jury. It is only when there is an entire absence of any facts to authorize the inference that the plaintiff was conducting himself with reasonable prudence and discretion, or the undisputed facts of a case prove actual negligence, that a case like the present should be withdrawn from the consideration of the jury. Such was not the state of the evidence at the trial. On the contrary, it appeared that the night was dark, that the horse of the plaintiff was gentle, that he was driving at the time of the accident on a slow trot, and that he and his companion were each looking out of the plaintiff's vehicle on the sides of the road at the time the collision took place. These facts were all competent, and had a direct tendency to show that the accident resulted solely from the obstruction of the road by the wagons of the defendant.

Besides; it appears that the wheels of one of these wagons against which the vehicle of the plaintiff struck was in the travelled track on one side of the road, in a position which might well cause an accident to a person using the highway, in the exercise of due care. The fact that the plaintiff had seen the wagon in the same place in the course of the day and before the accident happened does not necessarily show that he was wanting in due care. *Snow* v. *Housatonic Railroad*, 8 Allen, 450. *Reed* v. *Deerfield*, Ib. 522. Especially in this case, where the obstruction was unlawful, the plaintiff had just ground to suppose that it would be removed before nightfall.

*Exceptions sustained.*

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## Nelson V. Chaffee *vs.* Davis Pease.

If, in an action for trespass to real estate, the jury find for the plaintiff, without assessing any damages, the court may amend the verdict by inserting nominal damages, and may render judgment thereon.

Tort for trespass to real estate. At the trial in the superior court, before *Wilkinson*, J., the only question in dispute was as to the title to the premises. The jury returned a sealed verdict for the plaintiff, without assessing any damages, which verdict was affirmed and recorded, and the jury dismissed. The plaintiff thereafter moved that the verdict be amended, by the insertion therein of a finding of nominal damages, and that judgment be rendered for nominal damages; but the motion was overruled. The defendant moved in arrest of judgment, on the ground that the verdict was defective; but this motion was also overruled. Judgment was thereupon ordered upon the verdict, with costs to the plaintiff as the prevailing party, and the case reported for the determination of this court.

*M. P. Knowlton*, for the plaintiff, cited *Ryder* v. *Hathaway*, 21 Pick. 306; *French* v. *Hanchett*, 12 Pick. 15; *Coffin* v. *Jones*, 11 Pick. 49; *Clark* v. *Lamb*, 8 Pick. 415; *Porter* v. *Rummery*, 10 Mass. 66.

*H. Morris & C. A. Winchester*, for the defendant, cited *Coffin* v. *Jones*, 11 Pick. 49; *Connecticut River Railroad* v. *Clapp*, 1 Cush. 559; *Little* v. *Larrabee*, 2 Greenl. 37.

Gray, J. In this action for trespass upon real estate, the parties being at issue on the question of title, the plaintiff, upon proof of his title, was entitled as of course to nominal damages for the violation of his right, if he proved no actual damage. *Bolivar Manuf. Co.* v. *Neponset Manuf. Co.* 16 Pick. 247. *Appleton* v. *Fullerton*, 1 Gray, 194. *Dixon* v. *Clow*, 24 Wend. 191. The omission of the jury expressly to return such damages in their verdict for the plaintiff was a defect of the most formal character, which cannot be allowed to defeat the right of the plaintiff and the manifest intention of the jury. The plaintiff

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being satisfied with his verdict on the question of right, and not asking for any actual damages, the court in which the verdict was rendered clearly had authority to allow the amendment moved for. *The Queen* v. *Fall*, 1 Q. B. 646, 647. *Clark* v. *Lamb*, 8 Pick. 415. *Matheson* v. *Grant*, 2 How. 281, 282. *Foster* v. *Caldwell*, 18 Verm. 176. Gen. Sts. *c.* 129, § 41.

It does not follow that a judgment on this verdict, unamended, is so erroneous as to be liable to be reversed. On the contrary, the statutes of Massachusetts, in words which have hardly been changed for more than two centuries, declare that "no writ, process, declaration or other proceeding in the courts or course of justice shall be abated, arrested, quashed or reversed, for any circumstantial errors or mistakes, when the person and case may be rightly understood by the court, nor through defect or want of form only." Gen. Sts. *c.* 129, § 34. Rev. Sts. *c.* 100, § 21. *St.* 1784, *c.* 28, § 14. Prov. St. 13 W. III. *c.* 15, (ed. 1726,) 161. Mass. Col. Laws, (ed. 1672) 7. Body of Liberties, art. 25. Anc. Chart. 50, 364. The similar provision in the United States Judiciary Act of 1789, *c.* 20, § 32, has been held by the supreme court of the United States to apply to informal verdicts. *Roach* v. *Hulings*, 16 Pet. 321, 322. *Parks* v. *Turner*, 12 How. 45, 46. In the last case, a general verdict "for the plaintiff," without more, in an action on a promissory note, was held to support a judgment for the amount of the note declared on. Upon like grounds, judgment for nominal damages might well have been rendered upon the plaintiff's motion in the case now before us.

The statutes of the Commonwealth further provide that even "after judgment in any civil action, defects or imperfections in any matter of form found in the record or proceedings may be rectified and amended by the court in which the judgment is rendered, or by the court to which it is removed by writ of error, if substantial justice requires it, and if the amendment is in affirmance of the judgment." Gen. Sts. *c.* 129, § 42. Rev. Sts. *c.* 100, § 23. But upon this report the whole case and the judgment to be rendered therein are still within the control of the court; and as the verdict and judgment for the plaintiff, in the form in which they now stand upon the record, do not distinctly

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and formally state what he has recovered, or that he has recovered anything beside costs, the regular and proper course, in our opinion, is to remit the case to the superior court, in order that the verdict and judgment may be amended in that court by inserting nominal damages, and there may be in due form

*Judgment for the plaintiff.*

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## Eugene Camerlin *vs.* Palmer Company.

An abandonment of a married woman by her husband gives her the authority to put out her minor children to proper service and to assign their wages, for the purpose of aiding in the support of the family.

If an interpreter is employed as an agent to communicate an offer, which is accepted, the offer as communicated by him is admissible in evidence against his principal, for the purpose of proving the contract, without proof that he truly interpreted the offer which he was authorized by his principal to communicate.

If, in an oral agreement made through the medium of an interpreter, the language used is in dispute and is confused, it is proper to leave it to the jury to determine upon all the evidence what the contract was.

Contract brought to recover the wages of the plaintiff's minor children. The action was brought for the benefit of James B. Atwood, to whom the plaintiff had assigned the claim.

At the trial in the superior court, before *Wilkinson*, J., the defendants relied in defence upon a prior assignment of the wages by the plaintiff's wife to O. F. Packard, and introduced evidence tending to show that the plaintiff had temporarily abandoned her, without leaving her in possession of any means of support for herself and a large family of children, and that while he was thus absent his wife put some of the children into the service of he defendants.

She was a French woman and could not speak English, and Packard could not speak French. In order to prove an assignment of the children's wages to Packard, the defendants called as a witness Lucy Mongois, who testified that at the time referred to she went with Mrs. Camerlin at her request, to act as interpreter for her, to the shop of Packard; and Packard was

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then called, and allowed, under objection, to testify to what Lucy said that Mrs. Camerlin said at that interview. He accordingly testified as follows: "Lucy said, Mrs. Camerlin wants to get some goods. I said, if I could have my pay at the counting-room it would be all right, and told her to ask Mrs. Camerlin if I could take my pay at the counting-room. She talked to her in French, and the reply was, Yes. Nothing further was said about the contract. I said they could not take up any faster than they earned. I notified the agent of the defendants what the bargain was, and he assented to it."

The plaintiff called Lucy, who testified that the conversation at that interview was as follows: "Mrs. Camerlin said she would not give Mr. Packard an assignment of the children's wages, as the defendants' agent would not allow any one who assigned his wages to remain in the employment of the company, but that she could get the children's wages and come and pay him every month; that she told Packard this, and he thereupon agreed to furnish her goods."

The plaintiff asked the court to rule that there was no evidence of an assignment of the wages to Packard; but the judge instructed the jury that, the language of the parties being equivocal, it was for them to determine whether Mrs. Camerlin assigned the wages to Packard, and whether they both understood the wages to be assigned by this conversation; and that there was sufficient evidence from which they might infer an agency on her part to assign the wages, and left it to them to say whether or not the plaintiff had made her his agent, either by appointment or abandonment.

The jury returned a verdict for the defendants, and the plaintiff alleged exceptions.

*G. M. Stearns*, for the plaintiff, cited *Gregory* v *Pierce*, 4 Met. 478; *Wodell* v. *Coggeshall*, 2 Met. 89; *Shaw* v. *Thompson*, 16 Pick. 198.

*N. A. Leonard*, for the defendants.

Dewey, J. 1. In case a husband leaves his wife and home for months, and suffers his children to reside with her without the means of support, he is liable for necessaries furnished for

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herself and children. This position of the wife draws with it the implied authority to make suitable provision for the family, and authorizes her to act as his agent as to such supplies, and to employ the children at proper service in aid thereof. The wife, in the case supposed, must be considered as the agent of the husband to exercise the usual and ordinary care over the affairs of the household, and to contract for the services of the children for short periods, and to apply their earnings to her and their support. As cases bearing upon this point, we may refer to *Church* v. *Landers*, 10 Wend. 79; *Rumney* v. *Keyes*, 7 N. H. 571; *Hall* v. *Weir*, 1 Allen, 261; *Wodell* v. *Coggeshall*, 2 Met. 89; *Rotch* v. *Miles*, 2 Conn. 638; *Dumain* v. *Gwynne*, *ante*, 270. The court properly instructed the jury that it was competent upon the evidence to find such agency on the part of the wife. It was enough that such agency was shown, combining the facts of the abandonment by the husband, and the necessities of the family, and the fitness of employing the children in the service in which they were engaged. Such agency authorized the wife to assign their earnings for the support of the family to Packard.

2. The ruling of the court upon the admission of evidence as to what was stated by the interpreter, Mrs. Mongois, as Mrs. Camerlin's statements at the interview between her and Packard, was correct. The interpreter was the agent of Mrs. Camerlin, employed by her to communicate with Packard, and the statements made through such interpreter to him as to what she said are to be taken to be truly stated, and the admission of such statements would be no violation of the rules of law excluding hearsay evidence.

We have an early case upon this point, in *Fabrigas* v. *Mostyn*, reported in 20 Howell's State Trials, 123, where an interpreter had been employed to communicate certain proposals and receive the answer of the other party, and the question was, whether the words of the interpreter could be given in evidence by a witness, or whether the interpreter himself ought to be called, as the witness neither understood the question put to the party nor the answer made by him; and it was held by Gould, J. that the evidence of the witness was clearly admissible. In

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such case the interpreter is the accredited agent of the party, acting within the scope of his authority in the execution of his agency.

3. The evidence was properly submitted to the jury to pass upon the question what was the actual agreement and understanding of Mrs. Camerlin and Packard, as to an assignment of the wages earned by the children. The facts bring this case within the case of *Thruston* v. *Thornton*, 1 Cush. 89, upon this point. *Exceptions overruled.*

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LYSANDER C. SHEPARD *vs.* THOMAS ASHLEY.

Evidence to prove that a person was a skilful carpenter and joiner ten years ago in Massachusetts, or to show the relative value of the labor of a good architect and an ordinary joiner, is incompetent for the purpose of proving the value of that person's recent labor in erecting a building in Illinois.

CHAPMAN, J. This action is brought by the plaintiff, who lives in Bloomington, Illinois, and has lived there some eight or ten years, to recover the value of his services for labor on the inside of a building which the defendant was erecting in that place. The only question which appears by the report to have been in issue between the parties was the value of those services. It was on this point that the plaintiff offered the evidence which was objected to respecting his character and skill while he lived in Westfield, and before he went to Illinois, and as to the comparative value of the services of a good architect and an ordinary joiner in this vicinity.

One of the elementary rules of evidence is, that it must be confined to the points in issue; and the reason of the rule is, that the attention of juries may not be distracted, nor the public time be consumed needlessly. 1 Phil. Ev. (6th Amer. ed.) 732.

Since the rule is known to be established, an additional reason for enforcing it is, that parties do not come prepared to meet evidence which is not relevant to the issue. Those who are familiar with the trial of causes know that the rule is of great

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practical importance, and that evidence which raises collateral issues ought to be carefully excluded. The books contain multitudes of illustrations of the rule. Among the recent cases are *Murdock* v. *Mills*, 11 Met. 5; *Emerson* v. *Lowell Gas Co.* 3 Allen, 410; *Greene* v. *Washburn*, 7 Allen, 390; *Graves* v. *Jacobs*, 8 Allen, 141; *Hunt* v. *Lowell Gas Co.* Ib. 169; *Lincoln* v. *Taunton Copper Co.* 9 Allen, 18; *Dana* v. *Fiedler*, 12 N. Y. 40.

The plaintiff's evidence should have been limited to the value of such work at or about the time when it was done, and at or about the place where it was done; and neither his general character or capacity as a workman, nor the comparative value of the services of an architect and a joiner, were pertinent to the inquiry. The testimony which was objected to should hav been excluded. *Exceptions sustained.*

*W. G. Bates* & *M. B. Whitney*, for the defendant.

*H. B. Stevens*, for the plaintiff.

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JOHN MCKEAG *vs.* LAWRENCE O'DONNELL.

An appellant from the judgment of a justice of the peace or police court in a civil action need not recognize for the prosecution of his appeal and the payment of such costs as may thereafter arise, unless required to do so by the adverse party, under Gen. Sts. c. 120, § 26.

THIS was a motion to dismiss, in the superior court, an appeal from the judgment of the police court of Chicopee, in a civil action, on the ground that the record did not show that the appellant had recognized to prosecute his appeal and to pay all costs that might thereafter arise. The record did not show that the appellant had been required by the adverse party to recognize; and the motion was overruled. The appellee alleged exceptions.

*G. H. Knapp*, for the appellee.

*A. M. Copeland*, for the appellant.

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GRAY, J. The Gen. Sts. *c.* 120, § 26, reënacting the provision first introduced by the legislature in the Rev. Sts. *c.* 85, § 14, require that the appellant from the judgment of a justice of the peace in any civil action "shall before the allowance of his appeal recognize with sufficient surety or sureties to the adverse party, if required by him," for the effectual prosecution of the appeal and the payment of future costs. The record of the justice of the peace in this case does not show that the appellee ever required any recognizance. The appellee however contends that if he did not, the appellant was at least bound to enter into a recognizance without sureties. But such a construction is equally inconsistent with grammar and with reason. It would be quite as consistent with the language of the statute to maintain that a recognizance with sureties was to be taken in all cases, but not to the adverse party unless required by him. And a recognizance without sureties would give no additional remedy against the appellant himself. *Exceptions overruled.*

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## DANIEL B. MERRICK *vs.* JOHN WORK.

If beasts doing damage are distrained, and driven to the distrainer's yard till the pound-keeper can be called, and then delivered to the latter in the highway, it is the duty of the distrainer to state his demand, and to give notices, as required in Gen. Sts. *c.* 25, §§ 27, 29, 30; and if he omits to do so, he will be liable as a trespasser *ab initio*.

TORT for the conversion of twenty-nine sheep.

At the trial in the superior court, before *Russell*, J., it appeared that the defendant found the plaintiff's sheep in his orchard, destroying his apples and crops, and his hired men, by his direction, drove them into his barnyard, and one of them went for a field-driver, who lived at a distance of half a mile, and came immediately; and the sheep were then driven into the highway, where the field-driver received them and took them to the town pound, and afterwards sold them at auction. There was no evidence whether the provisions of Gen. Sts. *c.* 25, §§ 27, 29, 30, were or

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were not complied with; and the judge ruled that, under these circumstances, the defendant must be considered as a trespasser from the beginning.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

*E. D. Beach*, for the defendant.

*H. Morris & C. A. Winchester*, for the plaintiff.

By the Court. The ruling was clearly right. The sheep were in fact taken *damage feasant*, and not going at large in the highway. The defendant, having failed to comply with the provisions of Gen. Sts. *c.* 25, §§ 25–30, in relation to animals distrained for doing damage on land, was a trespasser *ab initio*. The case cannot be distinguished from *Sherman* v. *Braman*, 13 Met. 407. *Exceptions overruled.*

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Oberlin College *vs.* Henry Fowler & others.

If an executor who is authorized to sell real estate of his testator at private sale sells the same to his relatives for less than he might have obtained from others, for the purpose of favoring them to the injury of the legatees, the sale will be void; and on the trial of an issue to ascertain whether such sale was fraudulently made by him it is not necessary to instruct the jury that it must be proved that he in making the sale was guilty of gross neglect and mismanagement.

Bill in equity by a part of the residuary legatees under the will of Hannah E. Mix, against Henry Fowler, executor of her will, and Noah L. Strong and Edwin E. Kingsley, to set aside a conveyance of certain real estate made by Fowler to the other defendants on the ground of fraud.

An issue was framed to the jury to determine the question of fraud, which was tried before *Chapman*, J. The will appointed Fowler sole executor, and authorized him to sell the whole of the testator's real estate at private sale; and it was duly proved in June 1863. It appeared that Strong was the son-in-law and Kingsley the grandson of Fowler, and the conveyance in controversy was made to them on the same day when the letters



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testamentary were issued to Fowler, for the sum of $3500. The plaintiffs offered evidence that at the time of the sale the land was worth from $4000 to $4500; that several persons were desirous to purchase it, and two persons offered to start it at auction, one at $3250, and one at $3500; that it was situated in the central part of Westfield; that Fowler had agreed to sell it to the other defendants for $3000, but after these offers the price was raised to $3500; and that Fowler had promised several persons that he would not sell it without giving them an opportunity to purchase, but did in fact make the sale and conveyance immediately after he received the letters testamentary, and without giving any public notice that the property was to be sold. The defendants offered evidence in contradiction and explanation of this, and especially to show that the value of the land was not over $3000.

The defendants, amongst other things, asked the court to instruct the jury that in order to maintain the issue on the part of the plaintiffs it must be shown that Fowler in making the sale was guilty of gross neglect and mismanagement. The judge declined so to rule, and instructed the jury that the burden was on the plaintiffs to prove to their reasonable satisfaction that the sale was fraudulent, that is, that it was contrary to equity and good conscience, and that this involved the proof of two facts.

1. It must appear that the legatees were injured by the sale Fowler had a right to sell it to his son-in-law and grandson, and had a right to sell it at private sale, and if he had obtained from them as good a price as he could have fairly obtained from other persons by making reasonable efforts the plaintiffs had not been injured by the sale and had no cause of complaint; that the evidence as to the estimated value of the land was important, because the probability is that land can generally be sold at about its estimated value. But this is not always the case, and if an executor authorized to sell land cannot by reasonable efforts obtain that price for it, he may sell it for a less price. On the other hand, if he can by reasonable efforts obtain a greate price for it he is bound to use such efforts and to obtain the best

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price he fairly can by such efforts, even though he and many other persons may regard it as a speculative price.

2. If the jury were satisfied that the plaintiffs were injured by the sale of the land at too low a price, they were next to inquire into the motives of Fowler. He would not be liable for neglecting to use skill and ability beyond what he possessed. But he was bound to consult the interest of the legatees exclusively in making the sale, and not to consult the interest of the purchasers. The plaintiffs must prove that his purpose in selling the land for less than others would have paid for it was to favor his relatives who were the purchasers, to the injury of the legatees. If this was his purpose the sale was fraudulent, and ought to be set aside as void. The fact that they were his relatives is a suspicious circumstance, and tends to sustain the allegation of fraud. He had a right to sell at private sale, but if he had reason to believe that other persons were anxious to purchase, and made a secret bargain for the sale to the other defendants without giving any notice to others or using any efforts to ascertain what others would give, it was a circumstance tending to prove fraud. So if he sold it with unreasonable haste the jury might consider that as a circumstance tending to prove fraud. He had a right to make a verbal bargain with Kingsley for the sale before he obtained his letters testamentary, and if he made such a bargain it was proper that he should fulfil it, provided it was fairly made; but it was for the jury to judge from the circumstances whether it was fairly made.

The jury found a verdict for the plaintiffs, and the case was reported for the determination of the whole court.

*H. Morris*, *E. B. Gillett & H. B. Stevens*, for the defendants.

*W. G. Bates & J. Wells*, for the plaintiffs, cited *Arnold* v. *Brown*, 24 Pick. 89; 1 Sugd. Vend. (7th Amer. ed.) 52, 53, 31; *Drake* v. *Curtis*, 1 Cush. 395; *Commonwealth* v. *Bailey*, 11 Cush. 415.

Dewey, J Had the plaintiffs set forth in their bill a case of alleged loss occasioned by the mere negligence or want of skill on the part of the executor in conducting the sale of these premises, the court might properly have been asked to give the

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instructions adapted to such a case. But the burden of the complaint here was a charge of a more grave character, alleging an actual fraudulent purpose and a fraudulent sale of the property by the executor, and such was the issue framed for the jury to pass upon, and upon which they found a verdict against the executor. In this aspect of the case, the defendants have no ground for complaint that the instructions given were not sufficiently favorable to them. *Verdict to stand.*

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## William H. King *vs.* Eagle Mills.

**If payment for goods sold and delivered is resisted on the ground, among other defences, that the plaintiff falsely and deceitfully represented them to be of a particular quality, the defendant, to support this defence, must prove not only that the representations of quality were untrue, but that the plaintiff knew them to be so when he made them; and an omission so to rule will entitle the plaintiff to a new trial, after a verdict against him.**

Contract brought to recover the price of a quantity of rubber rags, sold and delivered by the plaintiff to the defendants.

The answer, among other things, averred that the rags were a different article from that for which the defendants bargained, and of an inferior quality; that they were unfit for use; that the same were never accepted by the defendants; that the plaintiff falsely represented them to be of a kind suitable for the defendants' business; and that the sale was by sample, and the rags delivered were not equal to the sample in quality, and were not of the same kind, and were not of the kind and quality known as rubber rags.

At the trial in the superior court, before *Rockwell*, J., there was evidence tending to show that the sale was by the plaintiff to an agent of the defendants, named Fuller; and that the plaintiff told Fuller that the rags were from a belting factory and not from suspender or rubber factories, like rags previously sold by the plaintiff to the defendants. Fuller testified that the plaintiff did not tell him the rags were from a belting factory

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but that they were better than rags from suspender or rubber factories; and that he said to the plaintiff, "You know what I want, (the defendants being manufacturers of paper, as the plaintiff knew,) and if it is better, as you say, I will give you eleven cents a pound for it." All this was denied by the plaintiff. Samples were produced and exhibited at this interview. Fuller afterwards asked if the plaintiff had concluded to sell the rags at eleven cents, and the plaintiff said, No, but if he had the stock he would send it the next day. This was accordingly done, but the defendants, upon examining it, notified the plaintiff that they would not accept it, on the ground that it was different from the samples and representations of the plaintiff. The goods in fact were rags from a rubber belting factory, and inferior in value to rags from suspender and webbing factories.

The plaintiff's counsel argued to the jury that, if the defendants would avoid the sale on the ground of deceit, they must prove that the plaintiff's representations were untrue, and that he knew them to be so at the time he made them. The defendants' counsel complained that the plaintiff's counsel in his argument had misstated the grounds of defence. The plaintiff's counsel then asked, in the presence of the jury, if the defendants abandoned the defence of deceit; to which the defendants' counsel replied that they did not. The plaintiff's counsel then asked the court to instruct the jury that, if the defendants relied upon false representations by the plaintiff, they must prove not only that the representations relied on were made, and were untrue, but also that the plaintiff knew them to be untrue when he made them. He also made various other requests for instructions.

The judge declined to give instructions in the form requested, but instructed them, upon the points above stated, only as follows:

"Although the defendants agreed to purchase the goods, yet if the goods delivered were a substantially different article, or if the goods were falsely represented by the plaintiff to be a kind of goods different from the goods described, and the kind of goods delivered to the defendants were of no value as stock to

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make paper of, then the defendants had a right to refuse the goods, and refuse to pay for them. The evidence tends to show that samples were used. The defendants contend that the bargain was made for rubber rags; that the only article known to the paper trade as rubber rags were the rags from suspender or webbing manufactories; that both parties knew this; and that the plaintiff knew that the defendants supposed they were buying that kind of goods, but delivered rags which came from a belting manufactory, an article worthless in the manufacture of paper, and not known to the trade as rubber rags. If you are satisfied these were the facts, the defendants had a right to reject the goods, and the plaintiff cannot recover. The plaintiff contends that the evidence shows that the goods delivered were rubber rags; that they were substantially according to the samples; that he told the defendants' agent that they were rubber rags, not coming from suspender or webbing manufactories, but from a belting factory; and that, after looking at the samples, the defendants' agent said they knew how to remove the rubber from the rags, and so he was willing to buy them, although they were not generally considered stock fit to use in making paper; and if he satisfies you of all this, he has a right to recover."

The jury returned a verdict for the defendants, and the plaintiff alleged exceptions.

*G. M. Stearns*, for the plaintiff.

*J. Wells*, for the defendants.

Bigelow, C. J. We can see no error in the rulings or instructions at the trial of this case, so far as they included the points which were in issue between the parties. But it seems to us that they were deficient in wholly omitting to advise the jury as to the rule of law by which they were to be guided in considering one of the grounds of defence relied on by the defendants to defeat the action. The answer sets forth three distinct and substantive allegations, on which the plaintiff's right to ecover is denied. The first is, that the merchandise, which was the subject of the contract between the parties, was different in kind and quality from that which was delivered. The second is, that the goods were sold by sample, and that those forwarded

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to the defendants did not correspond therewith. The third ground of defence as alleged is, that the plaintiff falsely represented to the defendants that the articles were of a kind and quality suitable for the defendants' business. The first two allegations or grounds of defence were fully comprehended within the instructions given to the jury, and the rules of law applicable thereto were accurately stated. But the third ground, although alluded to in the instructions, was left without any apt or precise rulings adapted to meet the phase of the case presented by the facts under this branch of the defence.

We cannot suppose that the defendants waived their averment of deceit, or did not rely upon it as constituting a sufficient reason for rescinding the contract and refusing to receive the merchandise. Any such inference is excluded by the express statement of their counsel, in answer to an inquiry put by the plaintiff's counsel, before the charge to the jury, that he did not intend to abandon that ground of defence. The case therefore went to the jury on the distinct and independent issue of a false representation in the sale of the goods, in addition to the other grounds of defence set up in the answer.

There can be no doubt that a vendee may rescind a contract for the sale of chattels, and refuse to receive or accept them, if the vendor has been guilty of deceit in inducing the former to enter into the bargain. But to maintain a defence to an action for the price of goods on this ground, the same facts must be proved which would be necessary to maintain an action for damages for deceit in the sale of goods. The elements necessary to support such an action or maintain a defence on the ground of deceit were correctly stated in the prayer for instructions on this point, submitted by the plaintiff's counsel at the trial. This prayer was not only refused in the form in which it was requested, but no adequate instructions were given in relation to this part of the case. There was an omission to state that the sale could not be rescinded on this ground unless the jury were satisfied that the representations were not only false, but that the defendants knew them to be false at the time they were made. This was an essential element which the

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defendants were bound to prove in order to maintain their defence to the action on the ground of deceit, and the plaintiff was entitled to an explicit instruction on this point. The omission to include it in the instructions given to the jury is fatal to the verdict. We have no means of knowing that the jury did not act on this ground of defence, and found their verdict on a misapprehension of the rules of law applicable to it.

*Exceptions sustained.*

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WEAVER B. AUSTIN *vs.* SAMUEL A. SHAW & another.

If a mortgage is executed to certain persons described as trustees of an association, which is not a corporation, the legal title under the mortgage vests in those persons, and an assignment of the mortgage by the association, or by only one of the mortgagees, is invalid, and will not enable the person named as assignee to foreclose the mortgage.

If the assignee under an invalid assignment of a mortgage has attempted to foreclose the same, the entry and possession of the administrators of his estate after his death, claiming under his title, will not operate as a disseisin of the mortgagor.

BILL IN EQUITY to redeem land from a mortgage.

It appeared that in December 1851 Eleazer Ripley mortgaged a lot of land in Springfield to M. B. Dean, William Patton, G. C. Wood and H. B. Judkins, as officers of the Mechanics' Union Association of Springfield, which was a voluntary association, to secure a note payable to them as officers of said association. In September 1852, an instrument was executed by which the Mechanics' Union Association, by William Patton, chairman of their finance committee, granted and assigned the mortgage, land and debt to Solomon Shaw. Ripley's estate in the premises was conveyed to David Warner in 1854. In March 1853 Shaw made an entry upon the premises for breach of condition, and a certificate thereof was duly recorded. Shaw died in January 1863, and the defendants, as administrators of his estate, took possession of the premises in February of that year, and have since received the rents and profits thereof. David Warner conveyed his interest in the premises to the plaintiff in 1864, and testified that the object of the conveyance was that

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he might be a witness. The plaintiff, before bringing the bill, offered to pay to the defendants the amount due on the mortgage.

The case was reserved by *Gray*, J. for the determination of the whole court.

*A. L. Soule*, for the plaintiff.

*H. Morris*, for the defendants. Warner's attempt to make himself a witness was in fraud of Gen. Sts. *c.* 131, § 14, and on that account he could not be a competent witness, and his deed conveyed no title to the plaintiff. His deed was likewise invalid for the reason that he was disseised at the time of making it. *Loud* v. *Darling*, 7 Allen, 205. The mortgage was foreclosed.

Bigelow, C. J. There was clearly no foreclosure of the mortgage from Ripley to Dean and others. The legal title to the premises under the mortgage was vested in the persons described as trustees of the Mechanics' Union Association of Springfield, who alone had power to make a valid assignment of the mortgage by which the title could pass to an assignee. No such assignment was made to the defendants' intestate. The society could not convey any title, because they were only *cestuis que trust;* nor could the assignment of one of the original mortgagees be effectual as a conveyance, for the reason that if the mortgagors held the estate as trustees for a voluntary association, their title was joint, and all must join in a conveyance in order to make a valid grant of the estate. *Webster* v. *Vandeventer*, 6 Gray, 428. *Chapin* v. *First Universalist Soc. in Chicopee*, 8 Gray, 580. *Peabody* v. *Eastern Methodist Soc. in Lynn*, 5 Allen, 540. The defendants' intestate was not, therefore, entitled to enter as mortgagee for the purpose of foreclosure, inasmuch as he had an assignment only from the society, which could pass no title to him.

The taking of the rents of the estate by the defendants in their capacity as administrators did not under the circumstances operate to work a disseisin of the owner of the equity of redemption. They did not claim to hold the estate except by virtue of the right or interest which belonged to their intestate as mortgagee at the time of his decease. Indeed, as administrators on his estate, claiming to hold the premises by

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virtue of their office, they could have no interest therein, if foreclosure had taken place prior to his decease. Their entry and possession must therefore be regarded only as a claim to hold a mortgage interest in the estate, such as was vested in their intestate at his decease, and not an adverse, exclusive possession, in denial of the right of the owner of the equity. The deed to the plaintiff therefore passed a good title, under which he can maintain this bill. *Decree for the plaintiff.*

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CHARLES PHELPS *vs.* GEORGE R. TOWNSLEY.

If a mortgage of an undivided half of a lot of land is assigned, "for the purpose of protecting any one to whom" the assignee "has made conveyance of any lands conveyed by said mortgage, from all claims of dower," the assignee may foreclose the mortgage, and when he has done so may have partition of the land, against the owner of the other half, irrespective of any question as to the duty of the assignee, under the above provision of the assignment.

PETITION for partition. The following facts were agreed in the superior court: The petitioner claimed title under the foreclosure, by himself, of a mortgage of one undivided half of the premises, originally given by Wells Lathrop to George Frost, in 1842, and assigned by the administratrix of the estate of Frost to John Mills, who assigned the same to the petitioner, the assignment reciting that it was made "for the purpose of protecting any one to whom said Phelps has made conveyance of any lands conveyed by said mortgage, and also such persons to whom John Mills, in his own name, or in the name of John Mills and John Mills, Jr., may have conveyed lands covered by the same, from all claims of dower." The respondent owned the other half of the premises. The petitioner had, by deed of warranty, conveyed the premises to John Mills, Jr., who with John Mills had conveyed a portion thereof to the respondent, by a like deed. The mortgage of Lathrop barred his wife's dower but, after his death, she had a right of dower in the equity, the title to which had come, by mesne conveyances, to John Mills

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Jr., in 1847; and the foreclosure of the mortgage became absolute in March 1864. After the commencement of this petition, the heirs of John Mills conveyed all their interest in the premises to the respondent.

On these facts, judgment was rendered for the petitioner; and the respondent appealed to this court.

*N. A. Leonard*, for the respondent. The language of the assignment creates a trust. The extent of the interest of Phelps was defined therein; and he has no further interest than such as is necessary to carry out the trust. *Nicoll* v. *Walworth*, 4 Denio, 385. *Doe* v. *Nicholls*, 1 B. & C. 336. *Doe* v. *Edlin*, 4 Ad. & El. 582. *Stearns* v. *Palmer*, 10 Met. 32. Even if a foreclosure was desirable to carry out this purpose, a partition is not necessary. All the purposes of the trust are satisfied with the foreclosure. The residue of the estate descended to the heirs of Mills. *Easterbrooks* v. *Tillinghast*, 5 Gray, 17.

*J. Wells*, for the petitioner.

Bigelow, C. J. The mortgage under which the petitioner claims as assignee, having been duly foreclosed, clearly vests in him a paramount title to one half of the premises in controversy, which entitles him to seek for partition.

If, as is urged by the respondent, the assignment of the mortgage to the petitioner creates a trust in him by which he is bound, we do not see that the partition for which he seeks will violate that trust. And if it would, we know of no ground on which an alleged violation of a trust can be set up in a court of law as an answer to a valid legal title in the petitioner. A remedy for the enforcement and regulation of a trust must be sought in equity. *Partition ordered.*

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## THOMAS MOORE *vs.* JOHN F. ROYCE.

A declaration alleging that "the defendant made a promissory note, a copy of which, with an indorsement thereon, is hereto annexed, payable to the plaintiff, and the defendant owes said plaintiff the balance due on said note and interest thereon," accompanied with a copy of the note and indorsement, is good, on demurrer.

CONTRACT. The declaration was as follows: "And the plaintiff says the defendant made a promissory note, a copy of which, with an indorsement thereon, is hereto annexed, payable to the plaintiff, and the defendant owes said plaintiff the balance due on said note and interest thereon." (Copy of note) "Union, Dec. 31, 1860. $347.75. For value received, I promise to pay Thomas Moore three hundred and forty-seven dollars and seventy-five cents, on demand with interest. J. F. Royce. (Indorsed) April 6, 1861. Received forty dollars." The defendant demurred to this declaration, assigning for cause that the allegation that the defendant owed the balance due on the note was uncertain, informal and insufficient. The demurrer was overruled in the superior court, and judgment rendered for the plaintiff; and the defendant appealed to this court.

*J. H. Blair*, for the defendant.

*W. L. Smith*, for the plaintiff.

BY THE COURT. This seems to us to be a merely verbal criticism. The declaration is almost in the words of the form prescribed by the statute. It sets forth with substantial precision and certainty the facts relied upon in support of the action.

*Demurrer overruled.*

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## George Edson *vs.* Lorenzo E. Munsell.

An easement in the land of an insane person cannot be acquired by prescription, under the statutes of this commonwealth, until the expiration of such time after his death or the removal of his disability as would bar an action by him or his legal representatives for the land, no matter how long such disability may continue.

Upon the issue whether an owner of land was insane at the commencement and during the continuance of the time in which an easement therein by prescription is alleged to have been established, the books of assessors of taxes are competent evidence to show that the land was taxed to his guardian; and a bond, found on file in the probate office, and appearing to be an official bond of his guardian, though not bearing a certificate of the approval of the judge, may also be introduced, coupled with proof that, at the date of it, and for many years afterwards, no record of the appointment of guardians could be found in any book, and that the only evidence of the appointment of guardians at that time was their bonds upon the files, and also coupled with proof by the records that such guardian was subsequently removed, and another person appointed in his place.

Tort to recover damages for the obstruction of water in an aqueduct laid in 1813 from a spring on land of the defendant to a tub on land of the plaintiff.

At the trial in the superior court, before *Rockwell*, J., the plaintiff introduced evidence tending to show that for more than forty years from 1813 he and his grantors had had open, adverse and exclusive enjoyment of this easement, without interruption from the owners of the defendant's estate; and he claimed a right by prescription, or by such and so long an enjoyment as furnished a presumption of a grant.

It was proved that Duty Partridge, from whom the defendant derived title, was under legal guardianship as a person *non compos mentis* from June 9th 1835 to the time of his death. He died September 26th 1856, aged sixty-nine years. A record of the probate court was introduced, which showed that in May 1835 the selectmen of the town of Wilbraham, in their official capacity, made a petition to the judge of the probate court, setting forth that Enoch Crocker, guardian of Duty Partridge, a person *non compos mentis*, had become by reason of age and other infirmities incapable of performing the duties of his trust, and praying that he might be removed from his guardianship, and some other suitable person appointed in his stead. Upon this petition, after due hearing, it was decreed that Crocker be

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removed, and that Eliphalet Hancock be appointed in his place. The register of the probate court testified that, upon an examination of the records in his office, he could find no other evidence of the appointment of Crocker, except a bond, which he produced, found upon the files of the court for the year on which it bears date, purporting to be given by Enoch Crocker of Wilbraham as principal, with his sureties, to Samuel Fowler, judge of the probate court, and his successors in said office, and reciting that the said Crocker had been duly appointed guardian of Duty Partridge, Jr., of said Wilbraham, who had been adjudged by the inquisition of the selectmen of said Wilbraham to be a person incapable of taking care of himself. The penal sum of said bond was one thousand dollars; it bore date May 18th 1813; and it was conditioned for the faithful performance of the duties of his trust. There was no writing upon it to show that it had been approved by the probate court. The register also testified that at that time, and for many years afterward, no record of the appointment of administrators and guardians could be found in any book, and that the only evidence he had been able to find of such appointments was the papers preserved upon the files of the court, and that in the case of guardians the only evidence of appointment he could find upon examination of the records previous to 1820 was their bonds which were upon the files.

In connection with the foregoing evidence, the defendant offered the bond in question, and also a book of the public records of the town of Wilbraham, to show that the assessors of said town for a series of years previous to 1835, taxed property to Enoch Crocker as guardian of Duty Partridge, as evidence tending to show that Crocker was the legal guardian of said Duty. And he offered the bond also as tending to show when the guardianship referred to in the record of 1835 commenced. But the judge excluded the evidence.

The defendant then offered to prove that Duty was in fact a person *non compos mentis* previous to the appointment of Hancock in 1835, during all the time the aqueduct had been maintained but the judge excluded this evidence also.

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The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

*M. P. Knowlton*, for the defendant. The evidence that Partridge was under legal guardianship before 1835 was competent. *Battles* v. *Holley*, 6 Greenl. 145. *Stockbridge* v. *West Stockbridge*, 12 Mass. 400. So also was evidence to prove him *non compos mentis* before that time; because there could be no presumption of a grant from one in that condition. *Melvin* v. *Whiting*, 13 Pick. 184. *Watkins* v. *Peck*, 13 N. H. 360. *Guernsey* v. *Rodbridges*, Gilb. Eq. R. 3. *Bradbury* v. *Grinsell*, cited in 2 Saund. 175 *i*. Prescription has always been held by our courts to rest on the presumption of a grant. *Barnes* v. *Haynes*, 13 Gray, 192. *Thomas* v. *Marshfield*, 13 Pick. 248. *Charles River Bridge* v. *Warren Bridge*, 7 Pick. 448. The original doctrine of prescription has become entirely merged in this more modern presumption, both as regards the length of time and the kind of use. *Lawrence* v. *Fairhaven*, 5 Gray, 115. *Luther* v. *Winnisimmet Co.* 9 Cush. 171. *Dana* v. *Valentine*, 5 Met. 13. Indeed, in this commonwealth, the same elements have been required to constitute a prescription as to establish such a presumption. *Arnold* v. *Stevens*, 24 Pick. 110. *Thomas* v. *Marshfield*, 13 Pick. 248. *Melvin* v. *Whiting*, 10 Pick. 297. *Gayetty* v. *Bethune*, 14 Mass. 52. And the remark of Judge Story in *Tyler* v. *Wilkinson*, 4 Mason, 401, was uncalled for, and is not authority. See *Gayetty* v. *Bethune*, above cited. *Sargent* v. *Ballard*, 9 Pick. 254. *Watkins* v. *Peck*, 13 N. H. 360.

*H. Morris*, for the plaintiff. 1. The use of the aqueduct from 1813 to 1861 established the plaintiff's title by prescription. *Coolidge* v. *Learned*, 8 Pick. 504. *Melvin* v. *Whiting*, 10 Pick. 295. *Kent* v. *Waite*, Ib. 138. 2 Greenl. Ev. §§ 538, 539. This title is established, although Partridge may have been insane. *Tyler* v. *Wilkinson*, 4 Mason, 401. 3 Kent Com. (6th ed.) 445. Title by prescription is founded on the common law, and not on any statute of Massachusetts. The notice to prevent the acquisition of an easement, provided by Gen. Sts. *c.* 90, § 34, may be given by the guardian of an insane person. 2. The use of the aqueduct for so long a time also furnished a conclusive presump-

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tion of a grant. *Hill* v. *Crosby*, 2 Pick. 466, and cases cited in note. This presumption is not controlled by Partridge's insanity. The grant of an insane person, not under guardianship, is only voidable, and not void. 2 Bl. Com. 291. *Allis* v. *Billings*, 6 Met. 415. *Gibson* v. *Soper*, 6 Gray, 279. 3. There was no sufficient evidence of a guardianship before 1835. The petition of the selectmen for Crocker's removal, with the order of the probate court thereon, did not prove a legal guardianship, and certainly did not show how long such guardianship had existed. The appointment of a guardian can only be shown by the record. The bond is not a record, and bears no evidence of acceptance by the court, or of the time when it was placed among the papers of the court. Samuel Fowler was never legally judge of probate. *Commonwealth* v. *Fowler*, 10 Mass. 290. If Crocker was appointed guardian, there is nothing to show that such appointment was a legal one *Chase* v. *Hathaway*, 14 Mass. 222. *Peters* v. *Peters*, 8 Cush. 544. The act of the assessors in taxing the property was *res inter alios*.

Gray, J. The main question presented by this bill of exceptions is, how far evidence of the insanity of the owner of land is competent to defeat a title to an easement in it, claimed by prescription or presumption of a grant, resulting from open, adverse and exclusive enjoyment for more than forty years. A statement of the elements of our law of prescription, and a sketch of its history, will best develop the rules by which this question must be decided.

The doctrine of acquiring property in lands or easements by adverse possession or prescription was derived from the civil law, and recognized in England as early as the thirteenth century. The necessary qualities of such possession or use to confer a title, are clearly stated by Bracton, and have not since been varied. It must be long, continuous, peaceable, open, by the knowledge and tacit consent, and without the express permission, of the true owner. Bract. 51 *b*, 52, 221 *a*. As to the length of time requisite, Bracton says that the claimant of a servitude must show use for a time beyond the memory of man, which may suffice for right, *non quia jus deficiat, sed quia*

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*actio deficit vel probatio.* 230. The length of possession necessary to give a right to land, without grant or livery, he says, is not defined by the law, but by the discretion of the justices. Yet that discretion seems to have been guided by the limitation of actions; for he immediately adds that any persons taking possession of lands, though without right, immediately have the freehold against strangers, and after long, continuous and peaceful possession, be in to hold it against all the world — *incipiunt possidere quoad omnes, et habere liberum tenementum ita quod sine brevi vel judicio ejici non possunt; quia sicut tempus est modus inducendæ et tollendæ obligationis, ita erit modus acquirendæ possessionis, longa enim possessio (sicut jus) parit jus possidendi et tollit actionem vero domino petenti quandoque unam, quandoque aliam, quandoque omnem, quia omnes actiones in mundo infra certa tempora habent limitationem.* 52.*a.* When Bracton wrote, writs of right (which had previously been limited by the reign of Henry I.) had by the Statute of Merton, 20 H. III. *c.* 8, been limited to the beginning of the reign of Henry II., or about ninety-three years, the reason given for which by Bracton is the impossibility of any one testifying, either of his own knowledge, or even from what his father had told him, to anything beyond that time. Bract. 373 *a.* Other civil actions also had already their established periods of limitation. Bract. 52 *a*, 102 *b*, 373 *a.* 1 Hale's Hist. Com. Law (5th ed.) 223, 224.

By the *St.* of Westm. I. *c.* 39, passed in 3 E. I., writs of right could not be maintained on an older seisin than from the time of Richard I., or about eighty-six years; and this limitation of the highest writ to recover the freehold was applied by the courts to the time of prescription, as being within the equity of the statute. 2 Inst. 238, 239. *Sedman* v. *Sedman*, 30 E. I. 59, 61. 2 Rol. Ab. 269. The simple principle of not undertaking to go back for proof beyond the memory of man having thus assumed the form of a maxim that the reign of Richard I. was the limit of legal memory, the law of England lost sight of the principle, and kept the maxim, the absurdity of which increased year by year. At last, after the limitation of a writ of right had grown to three centuries and a half, it was reduced by *St.* 32 H. VIII.



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*c.* 2, to sixty years. The reasons which had controlled the judges in extending the *St.* of Westm. I. to prescriptions would seem to have applied with increased force to the *St.* of H. VIII. But for reasons which do not appear this statute was construed with great strictness; Sir Richard Brooke, C. J. C. B. in the reign of Mary, thought that it applied to a title by prescription of anything of which it was necessary to allege seisin, but not to a claim of an easement; and in the time of the English Commonwealth it had ceased in practice to be applied to any prescription whatever. Co. Litt. 115 *a*. Bro. Ab. Prescription, 6; Limitations, 1, 2. Brooke's Reading on the Statute of Limitations, div. 2. Com. Dig. Temps, G. 1, 12, 13. 2 Rol. Ab. 269. *Coolidge* v. *Learned*, 8 Pick. 507, 508.

The founders of the Massachusetts Colony in the seventeenth century did not of course bring with them, as suited to their condition, a law which recognized only those rights by prescription which had begun in the twelfth century. But prescription was early recognized as a source of title in the law of Massachusetts. In Rolle's Abridgment are collected many cases of prescriptions held bad as against the public good, or against reason, or the law of the land, or common right, several of them decided in the reigns of Elizabeth and James I., not long before the emigration of our ancestors, and others taken from older books. 2 Rol. Ab. 265–267. The Massachusetts colonists, in the Body of Liberties which they established in 1641, went beyond this, and declared, "No custom or prescription shall ever prevail amongst us in any moral cause; our meaning is, maintain anything that can be proved to be morally sinful by the word of God;" and this article was preserved in the subsequent revisions of the laws of the colony. Body of Liberties, art. 65. Anc. Chart. 177. The Body of Liberties, being rather a declaration of rights than a code of laws, did not define the time or elements of prescription; but it did require the consent of the general court to "any conveyance or alienation of land or other estate whatsoever, made by any woman that is married, any child under age, idiot or distracted person;" and declared that "children, idiots, distracted persons, and all that are strangers or new

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comers to our plantation, shall have such allowances and dispensations in any cause, whether criminal or other, as reason and religion require." Arts. 14, 52. Neither of these articles appears to have been afterwards reënacted. And there was no saving of disabilities in the act of 1657, by which it was enacted that "any person who either himself or by his grantors or assigns had before the law of 1652 (which required conveyances of lands to be by deed acknowledged and recorded) possessed and occupied as his or their own proper right in fee simple any houses or lands within this jurisdiction, and should so continue without disturbance, let, suit or denial legally made, by having the claim of any person thereto entered with the recorder of the county," and prosecuted to effect within five years next after the 20th of May 1657, should with his heirs and assigns forever after enjoy the same. 3 Mass. Col. Rec. 422. 4 Mass. Col. Rec. pt. 1, 288. The general court afterwards held that this act confirmed the title of the possessor, even if he had nothing to show but his possession and the grant of the land was to another person. Ib. pt. 2, 515. Anc. Chart. 175.

Immediately after the Province Charter a similar act was passed, which is printed in Anc. Chart. 216, but which was disallowed by the king in council, because it contained no saving of the rights of the crown, and required only three years' possession to confirm titles. Another act was accordingly passed in 1697, declaring that quiet, continuous and undisturbed possession for twelve years from the 1st of October 1692 should give an absolute title in fee, with a saving of the rights of the crown; a proviso that it should "not be understood to bar the title of any infant, feme covert, or person *non compos mentis*, imprisoned, or in captivity, who shall be allowed the term of seven years next after such imperfection removed to pursue their claim;" and an allowance to persons beyond sea of ten years from the passage of this act. Prov. St. 9 W. III. *c.* 9, (ed. 1726) 90. Anc. Chart. 307. These were not mere statutes of limitation of actions, but conferred an absolute title by adverse possession, like the positive prescription or *usucapio* of the civil law. *Beckford* v. *Wade*, 17 Ves. 88. They applied, however,

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only to such possession beginning in 1692, and were probably occasioned by the unsettled state of titles immediately before the grant of the Province Charter.

The English statute of limitations of 32 H. VIII. (as amended by *St.* 21 Jac. I. *c.* 16, which did not however affect writs of right) was in force in Massachusetts until after the American Revolution. 6 Dane Ab. 106. Sullivan on Land Titles, 195.

In 1786 a new statute was passed, taken in great part from the English statutes, by the first section of which writs of right were limited to sixty years; by the second section writs of right on disseisin of ancestors and predecessors were limited to fifty years; and by the fourth section writs of formedon and rights of entry upon lands were limited to twenty years, with a proviso authorizing any person entitled to a writ of formedon or to make an entry upon land, and under age, *non compos*, or under other disability when his right first accrued, to bring such suit or make such entry within ten years after the expiration of said limitation of twenty years, or thirty years in all. *St.* 1786, *c.* 13. This proviso being confined to the writs of formedon and rights of entry mentioned in the same section, writs of right were absolutely barred in sixty years. This court held that since this statute the period of prescription must have the same limitation as a writ of right. *Coolidge* v. *Learned*, 8 Pick. 504. The *St.* of 1807, *c.* 75, reduced the limitation of writs of right to forty years, and of writs of entry upon disseisin of ancestors to thirty years, and did not otherwise modify the *St.* of 1786. By force of this *St.* of 1807, the period of prescription was fixed at forty years. *Melvin* v. *Whiting*, 10 Pick. 295. *Reed* v. *Northfield*, 13 Pick. 97. If those statutes had remained in force, the plaintiff's title by prescription would have been complete, although the person under whom the defendant claimed had been insane when his right accrued in 1813 and ever since; inasmuch as even an insane person could not have brought a writ of right after forty years, nor a writ of formedon, or of entry, either on his own disseisin or on that of his ancestor or predecessor, after thirty years; for the additional ten years allowed to persons under disability by the *St.* of 1786 did not run from the time of the

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removal of the disability, but were simply added to the ordinary limitation of twenty years. *Melvin* v. *Proprietors of Locks & Canals*, 16 Pick. 168.

But before thirty years from 1813 had elapsed, the Revised Statutes were passed. It becomes necessary therefore to examine how far they have changed the period of limitation of real actions not already barred when they took effect. By those statutes, all writs of right and formedon, and writs of entry except on the demandant's own seisin, were abolished after the end of the year 1839; and the clause saving rights of those then under disability to bring one of the actions so abolished need not be considered, inasmuch as it expressly provided that no such action should be maintained after it would have been barred by the statutes of limitation in force when the Revised Statutes took effect. Rev. Sts. *c.* 101, §§ 51, 52; *c.* 119, § 11. A person whose title had accrued in 1813, and who had been then and ever since insane, had however, when the Revised Statutes took effect, a right to make an entry at any time before 1843 upon land of which he had been disseised, because the *St.* of 1786 allowed him thirty years for that purpose, consisting of the general limitation of twenty years, with ten years added by way of allowance for his disability when his title accrued. The Revised Statutes (following the example of the English Sts. of H. VIII. and Jac. I. and the Prov. St. of 9 W. III.) substituted, for those ten years after the expiration of the ordinary limitation of twenty years, ten years after the removal of the disability. Rev. Sts. *c.* 119, § 5. Commissioners' note to Rev. Sts. *c.* 101, § 51. The limitation of writs of entry, not barred when those statutes took effect, was thus varied, and a person then entitled to such a writ, but who had been under disability when his right accrued, might bring it at any time within ten years after the removal of his disability, no matter how long such disability might continue. The provisions of the Revised Statutes above quoted are reënacted in the General Statutes, *c.* 134, § 48; *c.* 154, §§ 5, 11.

The reasons indicated by Bracton, and which controlled the English courts in the construction of the *St.* of Westm. I., and our own in the construction of the *Sts.* of 1786 and 1807, are

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sufficient to show that since writs of right have been abolished, and writs of entry substituted as the proper form of action to recover the freehold, the limitation of writs of entry should be held the legal limit of prescription of incorporeal rights. And the period of twenty years has been assumed and declared by this court to be the term of prescription in many recent cases *Ashley* v. *Ashley*, 4 Gray, 200. *Lawrence* v. *Fairhaven*, 5 Gray, 114. *Sibley* v. *Ellis*, 11 Gray, 417. *Currier* v. *Gale*, 3 Allen, 330. *Leonard* v. *Leonard*, 7 Allen, 277.

The commissioners on the Revised Statutes suggested the propriety of fixing by statute the term of prescription for easements at twenty years, and of excluding from the computation the time of insanity or other disability, without confining it to disabilities existing at the beginning of the time. Commissioners' Rep. on Rev. Sts. *c.* 119, §§ 14–18. But the legislature did not adopt these suggestions, and merely provided that easements should not be acquired by use or enjoyment for a shorter time than twenty years. Rev. Sts. *c.* 60, § 27.

In *Currier* v. *Gale*, the court held that the adverse possession necessary to give a title by disseisin to land owned by a single woman was not prolonged by her marriage after such possession had begun, because the statute of limitations of real actions saved those disabilities only which existed when the right first accrued, and was not suspended in its operation by a disability subsequently intervening. Mr. Justice Merrick said, "The same rule must for the same reason prevail in relation to easements or other rights acquired by prescription, or to titles established and confirmed by open, adverse possession." 3 Allen, 330 Upon the same ground it has been held in other states that a prescription cannot be interrupted by a disability which does not come into existence until after the time has begun to run. *Mebane* v. *Patrick*, 1 Jones, (N. C.) 26, 27. *Wallace* v. *Fletcher*, 10 Fost. (N. H.) 434. *Reimer* v. *Stuber*, 20 Penn. State R. 463. The *dicta* of Mr. Justice Story in *Tyler* v. *Wilkinson*, 4 Mason, 402, on which the plaintiff relies, if fairly susceptible of a wider interpretation than this, are in conflict with the general current of authority, and can hardly be reconciled with the opinion of

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the supreme court of the United States, as delivered by the same learned judge, in *Ricard* v. *Williams*, 7 Wheat. 109–111. If a person incapable of granting or consenting is to have no longer time to avoid a title by prescription than he would be allowed by the statute of limitations to bring an action for the land, he should at least be allowed the benefit of all the time which the statute does give.

The provision of the Gen. Sts. *c.* 90, § 34, for preventing the acquiring of an easement by notice from the owner of land, his agent or guardian, may have full effect, by applying it to persons who become insane after the beginning of the adverse use. And the object of that section was not to create easements, but simply to put restrictions on the mode of acquiring them. *Pierre* v. *Fernald*, 26 Maine, 442. *Rogers* v. *Sawin*, 10 Gray, 379.

If the time necessary to perfect a title by prescription to an easement in land is measured by any other rule than that derived by analogy from the statutes limiting actions to recover the land itself, it will be quite as difficult to establish such a title by the mere ordinary period of prescription against one who has been insane throughout the entire period.

It is an essential element of the use necessary to give a title by prescription, as laid down by Bracton, that it should be with the acquiescence of the true owner having the power to grant or interrupt the easement — *sine consensu expresso, per patientiam veri domini, qui scivit et non prohibuit, sed permisit de consensu tacito.* 52 *b. c.* 23, § 1. *Si autem in absentia veri domini utatur quis de patientia et permissione servientis, vel alterius qui jus non habet concedendi vel constituendi servitutem, talis usus non sufficiet, nec valebit ad possessionem acquirendam.* Ib. *c.* 22, § 2. The same principle has been repeatedly recognized by this court. *Sargent* v. *Ballard*, 9 Pick. 254. *Powell* v. *Bagg*, 8 Gray, 443. Bracton expressly says that an insane person cannot grant his estate, *quia donationi consentire non potest;* 12 *a*; nor lose his right of possession. *Cum semel possidere inceperint furiosi et mente capti, nunquam in tali statu desinere possunt possidere durante furore, non magis quam minor infra ætatem.* 375 *b.*

The ground upon which prescription has generally been pu

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in this commonwealth has been the presumption of a previous grant or agreement, which has been lost by lapse of time. *Rust* v. *Low*, 6 Mass. 97. *Gayetty* v. *Bethune*, 14 Mass. 53. *Thomas* v. *Marshfield*, 13 Pick. 248. *Nichols* v. *Luce*, 24 Pick. 103. *Morse* v. *Copeland*, 2 Gray, 305. *Jennings* v. *Tisbury*, 5 Gray, 75. *Powell* v. *Bagg*, 8 Gray, 443. But a grant cannot be presumed against a person legally incapable of making it. *Barker* v. *Richardson*, 4 B. & Ald. 579. *Rochdale Canal* v. *Radcliffe*, 18 Q. B. 315. An insane person cannot make a binding grant of his real estate. A sale of the whole or part thereof might indeed have been made in 1813 by license of the court of common pleas or of this court for payment of his debts or for his support. *Sts.* 1783, *c.* 32, § 2; *c.* 38, § 4. But in the absence of evidence of any defect in the records of either of these courts, it is difficult to see how such a license can be presumed. *Hathaway* v. *Clark*, 5 Pick. 490. *Weatherhead* v. *Baskerville*, 11 How. 360. There is no precedent for a sale of a mere easement out of the real estate of an insane person for the payment of his debts or maintenance. *Watkins* v. *Peck*, 13 N. H. 377. And conclusively to presume a lost license to sell such an interest would be to carry the doctrine of presuming whatever is necessary to give validity to an imaginary grant farther than it has ever yet been carried.

The fiction of presuming a grant from twenty years' possession or use was invented by the English courts in the eighteenth century to avoid the absurdities of their rule of legal memory, and was derived by analogy from the limitation prescribed by the *St.* of 21 Jac. I. *c.* 21, for actions of ejectment. It is not founded on a belief that a grant has actually been made in the particular case, but on the general presumption that a man will naturally enjoy what belongs to him, the difficulty of proof after lapse of time, and the policy of not disturbing long continued possessions. 2 Saund. 175 *note*. *Hillary* v. *Waller*, 12 Ves. 239. *Coolidge* v. *Learned*, 8 Pick. 508. In order to require the jury to presume a grant, the possession or use must have all the qualities of a prescription; it must be open, adverse, uninterrupted, and with the acquiescence of the owner. Any fact

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which directly affects the probability of such acquiescence must be submitted to the jury to assist them in determining whether such a presumption should or should not be made. *Daniel* v. *North*, 11 East, 374. *Ricard* v. *Williams*, 7 Wheat. 109, 111. *Melvin* v. *Proprietors of Locks and Canals*, 17 Pick. 260, 262. *Valentine* v. *Piper*, 22 Pick. 93. *Stevens* v. *Taft*, 11 Gray, 33. *Smith* v. *Miller*, Ib. 145. Best on Presumptions, 103, 105. Washburn on Easements, 70.

The defendant should therefore have been permitted to prove that Duty Partridge was in fact insane when the aqueduct was laid, and during all the time that it had since been maintained before the appointment of Hancock as his guardian in 1835.

The documentary evidence offered on this issue should also have been admitted. If Partridge was under guardianship as an insane person, it was the duty of the assessors of the town to tax his property to the guardian, and their books were therefore competent evidence that Crocker was this guardian in the years in which he appeared by those books to be so taxed. Stark. Ev. (4th Eng. ed.) 313. *Boston* v. *Weymouth*, 4 Cush. 542. *Pittsfield* v. *Barnstead*, 40 N. H. 477. And the bond of Crocker as such guardian, dated May 18th 1813 and produced from the files of the probate court, should have been admitted, in connection with the testimony of the register of probate, the record of the subsequent removal of Crocker from his guardianship, and the assessors' books, as evidence of the time of the beginning of that guardianship. *Gray* v. *Gardner*, 3 Mass. 399. *Battles* v. *Holley*, 6 Greenl. 145. Although the judge of probate then acting in this county had not been legally appointed, he held a commission from the executive, and was an officer *de facto*, whose judicial acts were lawful until reversed. *Commonwealth* v. *Fowler*, 10 Mass. 301. *Fowler* v. *Bebee*, 9 Mass. 231.

*Exceptions sustained.*

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# CASES

## ARGUED AND DETERMINED

IN THE

# SUPREME JUDICIAL COURT

FOR THE

## COUNTY OF WORCESTER, OCTOBER TERM 1865, AT WORCESTER.

PRESENT:

HON. GEORGE T. BIGELOW, CHIEF JUSTICE.
HON. CHARLES A. DEWEY,
HON. REUBEN A. CHAPMAN,
HON. HORACE GRAY, JR.,
HON. JAMES D. COLT,
} JUSTICES.

MEMORANDUM. On the eleventh day of September 1865, James D. Colt, Esquire, of Pittsfield, was appointed a Justice of this Court, in place of Mr Justice Metcalf, resigned, and took his seat on the bench on the first day of this term.

FOSTER FREELAND & others *vs.* GEORGE HASTINGS & others.

This court will not restrain by injunction the collection of a town tax "for contingent expenses," if it appears that the objects for which the money is wanted were stated orally at the meeting at which the vote to raise the money was passed, that no objection to the form of the vote was then made, that the objects for which it was raised were necessary expenditures of the town, that no appropriation of any part of the money to any unlawful purpose is intended, and that for many years the town has been in the habit of passing votes to raise money in that form.

The legislature have power to authorize towns to raise money by taxation for the purpose of refunding sums which have been contributed by individuals into a common fund for the general purpose of filling quotas of troops under calls of the president of the United

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States during the recent war; but not for the purpose of refunding sums paid by individuals for substitutes.

Towns may raise money at a meeting duly called after the annual meeting; and if at the annual meeting they have voted to raise so much money as to require the assessment of the full sum allowed by law to be assessed upon polls in any one year, a tax subsequently voted must be assessed only upon property.

PETITION by ten taxpayers, and more, of Sutton, setting forth that at the annual meeting of that town held on the 20th of March 1865, the town, under an article in the warrant, voted for the support of schools, $2000; roads and bridges, $2500; and for contingent expenses $9500, making no other or further appropriation thereof; that the objects of raising said sum do not otherwise appear from the proceedings of the town, and are still unknown to the petitioners; that in a warrant for another town meeting held on the 12th of June 1865, the second article was, "to see if the town will raise by taxation or otherwise such sums of money as may be necessary to pay and refund any money which has already been at any time contributed by individuals, in aid of and for the purpose of filling the quotas of this town, or furnishing men for the present war, under any requisition, order or call of the president or of the war department of the United States during the year 1864, under the provisions of chapter one hundred and fifty-two of the laws of 1865, or act or do anything relative to the same;" that on that article the town voted "that we raise the sum of $7000 to pay and refund the money which has been paid or contributed as specified in article No. 2 of the warrant;" that thereupon the assessors of the town assessed upon the polls and estates the aggregate of both of said grants, amounting to $25,516.28, with overlayings on the same to the amount of $900.28, making the rate of taxation on estates two dollars and thirty cents on one hundred dollars; that a warrant for the collection of said tax was delivered to George Hastings, the treasurer and collector of the town; that the grant of nine thousand five hundred dollars is illegal and void; that *St.* 1865, *c.* 152, authorizing towns and cities to reimburse money paid for recruiting purposes,* is unconstitutional; that the grant

* Section 1 of this statute is as follows: "Any town or city may raise, by taxation or otherwise, such sums of money as may be necessary to pay and refund

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of $7000 was larger than the aggregate of the sums that had been so paid and applied; and that if said grant was legal it should have been made the basis of a special and separate assessment, so that the polls of the town could be charged with the payment of their due proportion of the same. The prayer was, that the treasurer and other officers of the town might be restrained from collecting or enforcing said tax and grants, and for other relief.

The answer of the treasurer of the town set forth that the grants and appropriations of money made by the town of Sutton for the year 1865 were made in the same manner that the town has been accustomed to make such grants and appropriations for the last thirty years, as appears by the records of said town; that the appropriation of $2500 for roads and bridges, at the March meeting, was not an appropriation of money, but constitutes the basis of a separate tax, and is payable in labor; that the grant of $9500, under the head of "contingent expenses," was based upon a statement made by the chairman of the selectmen in open town meeting, and in the presence and hearing of the plaintiffs, or some of them, that the said sum was made up of the estimated town expenses for the current fiscal year, exclusive of the two thousand dollars granted for schools, and including $4375 for the repayment of money borrowed by the town to pay the town bounty of one hundred and twenty-five dollars to each one of forty-nine soldiers furnished by the said town to fill its quotas under the calls of the military authorities of the United States, during the year 1864; that the several sums of money making up the aggregate of $9500 were for purposes for which the town could legally raise and appropriate money; that the said chairman also publicly stated in said town

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any money which has already been paid and applied by such city or town, or contributed by individuals, in aid of and for the purpose of filling its quotas, or furnishing men for the present war, under any requisition, order or call of the president or of the war department of the United States, during the year eighteen hundred and sixty-four; *provided*, that all sums raised under this act shall be assessed and paid within three years from its passage."

This statute was repealed by *St.* 1866, *c.* 70.

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meeting that the aforesaid sum of $4375 would be required the present year and was absolutely necessary to repay the said bounty money, and that the sum of $3479.34 would be required to pay state aid to the families of soldiers, and that the other expenses of the town would be about the same as last year, which appeared by the report of the selectmen of said year to have been about $4700, making in all a sum much larger than $9500; that, after applying the sum then in the treasury, the balance to be provided for was more than $9500, including the discount on taxes; that at the town meeting held in June, a committee of the town chosen for that purpose reported that the sum of $6711 had been contributed by individuals and applied for the purpose of filling the quotas of the town under the calls of the military authorities of the United States for the year 1864; that this committee had but a very brief period within which to prepare and make their report, and it was stated in open town meeting that there were probably some items of expenses for recruiting purposes not included in the report of the committee, and it was suggested that the sum sufficient to cover such omission should be raised, and the sum of $7000 was voted for the purpose named in article 2d of the warrant; that the sum of $5717.60 was actually contributed by individuals for filling said quotas and paid out for that purpose, as shown by a statement of expenditures annexed, to which sum is to be added the further sum of $1000 for two substitutes, making in the whole the sum of $6717.60; that it was stated in the town meeting of the 12th of June that a discount on said sum of $7000 would be made for the prompt payment of the tax assessed therefor, and that the sum that would be realized from said appropriation would be insufficient to reimburse moneys paid out by individuals for recruiting purposes, as aforesaid; and that the town voted a discount of ten per cent. on all taxes paid on or before the first of September, which discount, being deducted from said sum of $7000, leaves the sum of $6300, which is less, including the $1000 aforesaid, than the amount so contributed by individuals.

The parties agreed that at the March meeting the chairman

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of the selectmen stated that about $2500 would be wanted for contingent expenses, naming some of the principal items, but not all of them; that certain expenses were said to be the same as those of last year; that at the meeting in June a person who was not the moderator made the alleged declarations as to additional items of expense for recruiting, and the ten per cent. discount on taxes, but the same were not heard by the petitioners, or some of them; that contributions for recruits were made by those who were and those who were not liable to the drafts; that the two substitutes were procured by individuals to save them from liability to the drafts; and that the grant of March would require a poll tax of two dollars.

The case was reserved by the chief justice upon the bill, answer and the foregoing facts for the determination of the whole court.

*W. Brigham & I. M. Barton*, for the petitioners. The grant of $9500 for contingent expenses was for an object unknown to the law and void. Gen. Sts. *c.* 18, § 10. *Alvord* v. *Collin*, 20 Pick. 418. The grant cannot be aided by proof of oral declarations in town meeting, or of a local custom to misuse language. Gen. Sts. *c.* 3, § 7. *Granger* v. *Parsons*, 2 Pick. 392. The assessment of the general grants of March should not have been confounded with the special grant of $7000 in June; and if either grant is void, the whole assessment must fail. Gen. Sts. *c.* 11, § 29. *Taft* v. *Wood*, 14 Pick. 366. *Stetson* v. *Kempton*, 13 Mass. 272. *Libby* v. *Burnham*, 15 Mass. 144. The *St.* of 1865, *c.* 152, is void, as against common right and natural equity. *Medford* v. *Learned*, 16 Mass. 215. *Society for Propagation of the Gospel* v. *Wheeler*, 2 Gallis. 105. *Dash* v. *Van Kleeck*, 7 Johns. 477. *McCarty* v. *Hoffman*, 23 Penn. State R. 507. Even assuming that these disbursements by individuals can be considered as acts of charity or patriotism, they cannot be reimbursed at the public expense. This act is retrospective in its operation; and violates the provision securing the right of acquiring, possessing and protecting property. Declaration of Rights, art. 1. *Lowell* v. *Oliver*, 8 Allen, 247. *Gray* v. *Coffin*, 9 Cush. 192. *Coffin* v. *Rich*, 45 Maine, 507. *Proprietors of*

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*Kennebec Purchase* v. *Laboree*, 2 Greenl. 275. The act also assumes to authorize towns to take private property for private use. Const. of U. S. Amend. 5. Men who have contributed soldiers from their own sons, and sacrificed them, men who themselves have volunteered as soldiers, and the widows of those who have fallen, are now called upon to reimburse those who advanced money for the purpose of shielding themselves; and who, to the great disparagement of the service, hired men of all sorts to serve by the side of our citizens. There is no public consideration in favor of repaying sums thus advanced for this purpose. The sum paid for substitutes should certainly not be reimbursed.

*P. E. Aldrich*, for the respondents.

Bigelow, C. J. We have given to the questions raised in this case that deliberate and careful consideration which their interest and importance demand. The power to raise and assess taxes, although essential and necessary to the maintenance and support of civil government, is to be exercised with care, and to be kept strictly within the limits imposed by law. It is the clear right of every citizen to insist that no unlawful or unauthorized exaction shall be made upon him under the guise of taxation. If any such illegal encroachment is attempted, he can always invoke the aid of the judicial tribunals for his protection, and prevent his money or other property from being taken and appropriated for a purpose or in a manner not authorized by the constitution and laws. The legislature of this commonwealth have provided a speedy and effectual remedy against the danger of illegal assessments by towns and cities, and the unauthorized expenditure by them of money raised by taxation. Under the provisions of Gen. Sts. *c.* 18, § 79, immediate resort can be had by a suit or petition to this court, sitting in equity, to hear and decide concerning the validity of a proposed tax or the right to pay money from the treasury of a town, and any violation or abuse of the legal right and power of raising taxes and assessing them on the inhabitants, as well as of expending money belonging to a city or town, can be effectually restrained and prevented by injunction. It is under this provision that the

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present proceeding is brought. The petitioners insist on various objections to the validity of the votes passed by the town of Sutton for the purpose of raising money by taxation for the current year, and to the manner in which the proposed tax has been assessed in pursuance of these votes of the town.

The first objection is, that the doings of the town at the annual meeting held on the twentieth day of March last, by which a vote was passed to raise the sum of $9500 "for contingent expenses" were illegal and unauthorized by law. The gist of this objection is, that a town can legally raise money by taxation for certain specified and enumerated objects only, and that it does not appear on the record of the meeting of the town that the large sum proposed by this vote to be raised for contingent expenses was required for any legitimate or authorized purpose, or that it is to be appropriated for any of the objects for which a town is empowered to raise money by taxation. There would be great force in this objection, if the case stood on the vote alone. As a town in raising money acts under a delegated power, strictly defined and limited, it is necessary to the validity of its action that it should be within the limits of its legal capacity. A vote to raise moneys for contingencies only, without qualification or limitation, or any designation of the purpose to which the money is to be appropriated, if it was intended to embrace any considerable portion of the sums raised by a town, would be equivalent to a general vote to raise money. But a town or city has no power or authority to pass such vote. Inasmuch as it can grant money only for certain specified and enumerated objects, unless these are in some way designated in the vote authorizing a tax, or otherwise declared and made known at the time of the grant of money, there would be no means of ascertaining whether a town acted within the limits of the authority granted to it by the legislature in voting the money, and no mode of restraining the agents of the town in its appropriation and expenditure. Every voter in a town has a right to know or to have the means of ascertaining the purposes and objects for which money is proposed to be granted; otherwise he cannot judge of the necessity or propriety of the grant

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or intelligently exercise his privilege of voting thereon. Every inhabitant who is liable to assessment ought to have access to sources of information by which he can ascertain whether he is called on to contribute to objects which can properly be made a municipal charge or burden; otherwise he might be subjected to unlawful exactions without the means of redress. It is obvious, therefore, that the power of raising money by taxation, delegated to towns, ought to be exercised by making specific grants or appropriations, and not by votes expressed in vague and indefinite terms, which give no indication of the purposes for which the money is to be appropriated and expended.

We do not mean to say that a grant for contingent expenses would in all cases be irregular or objectionable. If limited to small amounts, and designed to cover items of expenditure which could not be enumerated, but which were only incidental to the execution of the main objects of municipal expenditure for which specific grants were made, such a grant could not be deemed to be an unauthorized or excessive exercise of the power to raise money conferred on towns by the legislature. But it would be otherwise if the whole or any considerable part of the annual appropriation of a town should be embraced in a general vote of money for contingencies, unaccompanied by any statement or explanation, either oral or written, of the purposes for which it was to be expended.

The vote of the town of Sutton, at its annual meeting, was in form obnoxious to the objection to its legality urged by the petitioners. But the facts disclosed by the answer, which are not controverted, clearly show that the objection is one of form only, and not of substance. It appears that this grant, though expressed to be for contingencies only, was in fact based upon a statement made by the chairman of the selectmen at the meeting of the town at which the vote was passed, in presence of the petitioners or some of them, setting forth the specific objects for which a principal part of the money proposed to be raised was required, and that the whole sum raised was for the necessary expenditures of the town, and clearly within the scope of the powers granted to towns to raise and appropriate money. It



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also appears that this mode of making the annual grants and appropriations of the town has been practised without objection by the inhabitants in their town meetings during the last thirty years, and it does not appear that any objection has ever been made to this method of procedure in previous years, or that any question concerning its legality or regularity was made at the time when the vote appropriating the money was passed in March last, in the presence of some of the petitioners, or at any time since until the commencement of the present proceedings. In this state of facts, we think it very clear that no case is made out for interfering with the collection of the tax in question on the ground that the vote under which it has been assessed was too general and indefinite in its terms. No money has in fact been granted or appropriated under the vote for an illegal purpose; and the inhabitants of the town knew, or had the means of knowing, the specific objects for which the money was to be expended at the time the appropriation was made. The long acquiescence of the inhabitants of the town in the mode of appropriating money adopted at the meeting in March, in connection with the fact that the petitioners show no injury, either actual or threatened, to their rights by an appropriation of any part of the money thus granted to any unlawful purpose, is decisive against their right to relief against the enforcement of this part of the tax, on the ground of the invalidity of the proceedings in making the grant of $9500.

We are now brought to the consideration of the more serious objections urged by the petitioners to the vote passed at the meeting of the town in June last, by which the sum of $7000 was granted to pay and refund such sums of money as had been previously contributed by individuals in aid of and for the purpose of filling the quota of soldiers allotted to the town, or furnishing men for the existing war under any requisition, order or call of the president or war department of the United States during the year 1864. The fundamental objection urged against the validity of this vote is, that although the town was authorized to raise money for the purpose therein expressed by the provisions of *St.* 1865, *c.* 152, the legislature exceeded their

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constitutional authority in passing the statute, and could not lawfully clothe towns with the power to raise money for any such purpose. In considering this grave objection, and the reasons on which it is founded, we assume that certain propositions which have not been called in question at the bar are clear beyond controversy. The first is, that it was competent for the legislature to appropriate money and levy a tax on all the inhabitants of the Commonwealth for the purpose of paying bounties to persons who had volunteered or might volunteer to enlist as soldiers in the armies of the United States raised under orders of the federal government to aid in suppressing a rebellion against the constituted authorities of the United States. This was settled on full and careful consideration in *Lowell* v. *Oliver*, 8 Allen, 247. It was also there determined that it was not an excess of authority or an unlawful exercise of power by the legislature to raise and appropriate money for the purpose of reimbursing to the several towns of the Commonwealth the amount of such bounties as had been previously advanced and paid by them to persons who had enlisted in the military service of the United States. The payment of money for such a purpose was deemed to be in the nature of a public burden or charge, which the legislature might distribute by taxation among the whole people of the Commonwealth, and it was held to be immaterial whether the tax was assessed in anticipation of such payment, or for the purpose of refunding money to the cities and towns which they had advanced without legislative sanction for the purposes of meeting and performing a pressing public duty or charge for which no adequate provision had been made in anticipation by the legislature.

Another proposition, which seems to us to be equally clear, is, that it is competent for the legislature to impose on towns the burden of performing certain duties of a public nature, which primarily devolve on the state, and for the due execution and fulfilment of which it is incumbent on the legislature to provide. Many of the important institutions of civil governments, and of the rules and regulations on which the welfare and good order of society essentially depend, can be conveniently maintained

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and enforced only by a delegation of authority from the law-making power either to individuals or to corporations, municipal or otherwise, who, from their situation or organization, and their peculiar relations to the community, can efficiently carry out and execute in detail a class of duties which the state itself through the immediate officers of the government might find it difficult or impracticable to perform. Familiar instances of such delegation of power are found in the laws providing for and regulating the construction and maintenance of roads and bridges, the support of paupers and the establishment and support of public schools — duties all of which originally and primarily devolve on the Commonwealth, and which it is their province to see are properly and effectually fulfilled. It is certainly true that the burden of performing these and other similar duties does not always bear with perfect equality upon those to whom they are delegated, and who are charged by the legislature with the care and expense of their fulfilment. One town may have a greater extent of roads and bridges to construct and maintain, or a larger number of paupers to support, or of children to educate, than another town of the same size, population and resources. But such inequalities are inseparable from the imperfection of all human institutions. Perfect equality in the allotment of public burdens is unattainable. If they are distributed on just principles, applicable alike to all on whom they are imposed, if no undue discrimination is made among those on whom a charge or duty is laid, if no tax is assessed which is disproportionate or "without the assent of the people or their representatives," substantial equality will be attained, and no legal or constitutional right or privilege will be violated or invaded. We suppose it to be true that originally one of the main objects of a division of a state into counties and towns was, the necessity of having a convenient and permanent system of agencies, by means of which many of the burdens and duties which are incident to and inseparable from the institutions of civilized society and the due execution of wise and wholesome laws could be readily and fairly distributed and performed. From the earliest period of the history of the colonies of Plymouth

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and Massachusetts Bay, towns and counties, especially the former, have been charged with the execution of such duties and the costs and charges incident thereto. Among those thus delegated to towns was the duty of raising and organizing soldiers or militia for the common defence, especially in time of war or imminent public danger, and of providing arms and ammunition for their use. Plym. Col. Laws of 1682, (ed. of 1836,) 71, 114, 215, 224, 285. 1 Mass. Col. Rec. 84, 187; 2 Ib. 282; 3 Ib. 32, 256, 26; 4 Ib. 83; 5 Ib. 399, 412. See also Prov. Sts. 5 W. & M. *c.* 7, §§ 10, 21; 16 Geo. III. *c.* 1, §§ 4, 7, 20; *Sts.* 1776, *c.* 21; 1781, *c.* 21.

There would seem to be no good reason for supposing that a power so long exercised without doubt or question operates unequally or oppressively, or in any respect conflicts with the constitutional rights and privileges of the citizen.

If this be so, then it would follow that it was competent for the legislature to confer on towns the power to offer and pay bounties to persons who should enlist in the public military service for the purpose of filling up the calls made on the state by the president of the United States, and completing the quotas assigned to the several towns. The power to authorize towns to raise and appropriate money for such a purpose is necessarily included within the larger power by virtue of which the duty of raising their due proportion of troops may be imposed on the several towns. The legislature were clearly authorized to confer all the necessary and reasonable incidents and means by which towns might be enabled to fulfil the duties which they were required to perform. If an expenditure of money was reasonably necessary and proper to enable towns to fill the quotas of troops allotted to them respectively, it would be competent for the legislature to authorize the appropriation of money for the purpose, or to confirm and make valid the doings of towns in raising money to accomplish the object. This power was distinctly recognized in the recent case of *Fowler* v. *Selectmen, &c. of Danvers*, 8 Allen, 80. The action of the town which was called in question in that case was taken under *St.* 1863, *c.* 38, which not only authorized the raising of money by towns for

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the payment of bounties, but also ratified and confirmed the doings of towns which had previously raised and appropriated money for that purpose. Although it was there held that the town had exceeded the authority conferred by the statute, the validity of the statute itself was not only not called in question, but it was assumed both by the counsel and the court. On reconsideration, we see no reason for doubting that this assumption rested on firm and solid foundations.

It may not be immaterial to notice in this connection that there is an early precedent in the legislation of this state which serves to show that the raising of men for military service and the payment of bounties to them by towns were not deemed by a legislature nearly contemporaneous with the foundation of our constitution to be inconsistent with common right, or contrary to the principles on which our government and institutions are founded. By an act passed in 1777, *c.* 41, it was provided that towns at any legal meeting might vote money "for the encouragement of men to engage in the army," to be assessed on the inhabitants of towns according to the rules and methods prescribed by law for apportioning the state tax; and it was further enacted that all grants and assessments which had been voted in times past for such purposes should also be deemed and taken to be legal and valid.

From what has been stated, it would seem to be clear that it would have been competent for the legislature to authorize towns in 1864 to pay bounties to persons who should then enlist in the military service of the United States, or to pass an act subsequently confirming and declaring valid any vote or grant of money previously made by towns for such an object. Nor is this proposition seriously controverted by the learned counsel for the petitioners.

But it is urged on their behalf, and this forms the main ground on which they seek to set aside the tax assessed by the town, that the money which the *St.* of 1865, *c.* 152, authorizes the town to raise by taxation is not to be appropriated as under previous acts to refund moneys paid by towns, acting as public agents in the discharge of a clearly recognized duty which they

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were bound to perform on behalf of the Commonwealth, but that under the provisions of the statute the tax in question is imposed for the purpose of repaying to individuals various sums of money which they had previously contributed to a common fund, the object of which was to enable the towns to furnish the quota of troops allotted to it under the act of congress of February 20th 1864, St. of U. S. of 1864, *c.* 13, by the payment of bounties to those who should voluntarily enlist in the service of the United States, instead of supplying the requisite number by resorting to a compulsory draft. It is contended by the petitioners that the effect of such an appropriation of money by the town to be raised by taxation is equivalent to the taking of money from one individual or class of individuals for the purpose of giving it to another individual or class; or, if this view be not correct, that it is an assessment laid on the holders of property, not for a public object or a legitimate purpose of expenditure, but to satisfy claims having no real existence, and which were created by an act of retrospective operation in favor of persons who had no just or equitable right to reimbursement either from the Commonwealth or the town. If this is a correct statement of the provisions of the statute and of the effect of the appropriation of money and the assessment of the tax which it authorizes, it is certainly open to very grave and perhaps insuperable objections. But after careful consideration, bearing in mind the presumption in favor of the validity of the statute which always exists when an act has been passed according to the forms prescribed by the constitution, we are all of opinion that the objections to its validity are founded on a partial and limited view of the scope and purpose of the act and of the true nature and object of the contribution of money, the reimbursement of which towns are authorized to make under its provisions.

Under the act of Congress of February 24, 1864, St. of U. S. of 1864, *c.* 13, as well as under previous acts, the president of the United States was authorized to call for such number of men for the military service of the United States as he might deem necessary, in view of the public exigencies during th

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existence of the war, and, if the quotas of each city or town were not filled within the time designated by the president, a draft of such number of men as were deficient in such quotas was authorized to be made. In view of this authority, and in consequence of calls made by the president, as well as in anticipation of the requisitions for troops to fill the regiments and companies from this state then in the field, the mayors of cities and the selectmen of towns were, by an order of the governor of the Commonwealth, dated May 31st 1864, continued as recruiting officers for the purpose of procuring recruits by voluntary enlistment, as had been done under previous calls made by the authority of the United States. *Tyler* v. *Pomeroy*, 8 Allen, 498.

It was under these enactments, and the calls of the president and the order of the governor which followed them, that the selectmen and inhabitants of the several cities and towns throughout the Commonwealth became engaged in the year 1864 in strenuous efforts to raise the number of troops allotted to each city and town as its quota. One great purpose was to avoid a resort to a draft, and the hardship and inequalities, as well as the social and industrial evils, which might follow, if, in consequence of a failure to procure recruits by voluntary enlistment, it became necessary to select them by lot from those citizens who were enrolled and liable to military duty. Indeed, the policy of the United States, as well as of the Commonwealth, from the beginning of the recent war to its close, seems to have been to procure troops by the enlistment of volunteers rather than by a draft. It was only after the lapse of a period of time to be designated in each call for troops by the president, during which the quota of states could be filled by voluntary enlistment, that he was authorized by congress to supply deficiencies which might be found to exist in the quota of any state by a draft among those who were borne on the enrolment lists. It certainly cannot be doubted that the duty of procuring volunteers to enlist in the armies of the United States, under calls from the president, did not rest on any particular class of individuals in the community. It is true that those who were liable to draft in the event of a deficiency of volunteers had a more immediate

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interest in increasing the number of those who should voluntarily enter into the service; but no greater or heavier obligation or duty rested on them to procure volunteers than upon any other class of individuals. The war being waged by the constituted authorities in compliance with the will of the majority of the people, as ascertained and declared according to the forms prescribed in the constitution, the duty of contributing to its support and of adopting means to supply the requisite number of soldiers to carry it on to a successful issue become obligatory upon all, as well those who from age or other causes were not liable to the personal performance of military duty, as on those who in a certain contingency might under the laws of congress be called upon to do a soldier's duty in the field. Neither the officers of the state nor the citizens thereof could refuse their aid or withhold their support from all legal and constitutional measures deemed to be necessary by the government of the United States for the prosecution of the war. Every member of society became bound to bear, according to his position and means, a fair proportion of the burdens incident to the defence and support of the government. It was on this ground that it has been heretofore held by this court that the legislature of the Commonwealth have the constitutional power to levy a tax on all the inhabitants of the Commonwealth for the payment of bounties to soldiers, and the reimbursement of towns which had voluntarily advanced such bounties without previous legislative authority. *Lowell* v. *Oliver*, *ubi supra*.

It would seem to follow as a necessary consequence that not only was the payment of bounties by the Commonwealth and by cities and towns for the purpose of procuring volunteers a proper and legitimate object of expenditure of public money raised or to be raised by taxation, but also that money contributed voluntarily by individuals to raise a fund for the same purpose may well have been considered by the legislature as an advancement of money for a public object. When in the summer of 1864 it became necessary to furnish a large additional number of soldiers to the army of the United States by filling the quotas allotted to the several cities and towns, a public

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exigency had arisen for which no adequate provision had been made by the legislature. The alternative was presented to the people of the Commonwealth of procuring volunteers to enlist by the payment of bounties or of submitting to the evils and hardships attendant upon an attempt to recruit the army by a draft. In most if not all of the cities and towns, it was deemed to be wise and expedient and most for the interest of the inhabitants to embrace the former branch of this alternative, and accordingly, as no authority was then vested in towns or cities to raise money by taxation or otherwise for the payment of bounties, resort was had to the method of procuring voluntary contributions to raise a fund in each town for such purpose. But these contributions, though voluntarily made, and without any legal claim on the town or city for reimbursement, or any expectation of legislative sanction, were nevertheless given in aid of the performance of a public duty which devolved on the city or town, and for which it would have been competent for the legislature, in anticipation of the exigency, to authorize money to be raised by taxation or otherwise, on the credit of a town or city. In this view, the question as to the validity of the St. of 1865, c. 152, resolves itself into this: whether it was competent for the legislature to authorize towns and cities to repay to individuals money which, in the opinion of the legislature, they had advanced in a pressing public exigency to enable a town or city to discharge a duty which was legally devolved upon it, and which it could not have performed without such adventitious aid. Upon the best consideration which we have been able to give to the subject, we can see no legal or constitutional objection to the action of the legislature. We are not called on to determine upon the wisdom or expediency of the act. Confining ourselves to the question whether the legislature have transcended their authority in passing it, we are of opinion that no private right is invaded, and no constitutional barrier overstepped, in giving authority to cities and towns to raise money by taxation to reimburse individuals for contributions made in aid of an object of a public or municipal nature, or, in other words, that as it is competent for the legislature to authorize

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the imposition of taxes to raise money to be expended for a public purpose, so it is competent for them to sanction an expenditure already made for a like object, and to give authority for its repayment by means of taxation. If these views are correct, then it follows that the statute under consideration is not obnoxious to the objections to its validity urged by the petitioners. It cannot in any just sense be said that the legislature authorized an assessment by means of which money could be capriciously taken from one individual or class and given to another, or that it sanctioned the appropriation of public money to the payment of claims which had no just or equitable existence. The clear and decisive answer to all such objections is, that the money which the statute authorized towns to repay by means of taxation was raised and contributed for a public object. This seems to us not only to constitute a test by which the validity of the statute is proved, but also a safe limit by which the power of the legislature to authorize taxation for repayments or reimbursements of money advanced without legislative sanction may be restrained. On these grounds it seems to us that the action of the town of Sutton, so far as it authorized the assessment of a tax to repay the sums of money contributed by individuals in the months of May, June and July 1864, and subsequent thereto, towards a fund "in aid of and for the purpose of filling the quota of the town and furnishing men for the war," and the payment of the necessary incidental expenses of procuring volunteers, would have been open to no valid legal objection.

But the vote of the town in June last appropriating money and laying a tax was not limited to these objects. The sum of one thousand dollars beyond the amount necessary for the purposes above named was included in the appropriation. The facts in regard to this additional amount are these. It appears that two persons, inhabitants of the town, who were duly enrolled and liable to military duty, in order to protect themselves from liability to draft, each procured a substitute who was accepted and entered into actual service, and that each of these paid for his substitute the sum of five hundred dollars. It was to reimburse the sums so paid for these substitutes by the

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persons who furnished them that the sum of one thousand dollars was added to the appropriation by the vote of the town. It seems to us that to such an appropriation of money to be raised by taxation there are two decisive objections. The first and most obvious one is, that it is not within the authority conferred by the statute. The legislature manifestly contemplated only the repayment of money to those who advanced money towards a common fund which had been used for the general purpose of recruiting the requisite number of troops to fill quotas, and which had been appropriated in discharge of the public duty or burden which devolved on the town. This intention is clearly manifested by the statute, which limits the authority to the raising of money to refund sums which had been "contributed by individuals;" that is, according to the strict and proper meaning of the language, which individuals had given or paid as part of a common stock. This construction is fortified by the connection in which the language was used. The authority is to refund money which had been paid or applied by towns or contributed by individuals for the objects designated; clearly intending to embrace within the latter category only such sums advanced by individuals as had been used in the same manner and for the same purposes as money taken from the treasury of the town for the general purpose of obtaining the requisite number of soldiers allotted to the town. It is very clear that money paid by individuals to procure substitutes to relieve themselves from liability to draft does not come within the letter or spirit of the statute as thus interpreted. It was neither contributed to a common fund, nor was it used for the general purpose of filling the quota of the towns or of discharging the municipal duty of enlisting troops for the war.

But the other and more decisive objection to the repayment by the town of money paid for substitutes is, that if the language of the statute would warrant the raising of money for such purpose, the legislature have no power to confer such authority on the town. The right to furnish a substitute is a personal privilege conferred on those who are enrolled and liable to do military duty, by means of which they can obtain exemption

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from a personal duty or burden which is imposed on them by law. By an act of congress, St. of U. S. of 1864, *c.* 13, § 4, it is provided that any person enrolled in pursuance of the provisions of law may furnish at any time, previous to a draft, an acceptable substitute, and thereupon he shall be exempt from draft during the time for which such substitute shall have been accepted. Under this provision, by procuring a substitute, a person liable to military duty obtains an exemption not merely from an impending draft or liability under an existing call for troops, but for the entire period of time for which his substitute is enlisted. It is obvious that money paid by an individual to procure a substitute in his stead is not paid primarily or chiefly for a public object, but to purchase a personal exemption from a duty or liability to which he is subject by law. It is not contributed to a common fund in aid of a general duty which rests on all citizens, or for the benefit and relief of all of a certain class of citizens who are liable to the performance of an onerous public duty, but it is paid for a specific object and for the benefit of a single individual. We know of no rule or principle on which a valid authority to raise money by taxation to be appropriated to the repayment of money expended by individuals for such a purpose could be granted by the legislature. A statute conferring such power would be obnoxious to the objection that it authorized the raising of money by taxation for the exclusive benefit of particular individuals; that it relieved one citizen from the performance of a legal duty at the public expense; and appropriated money for a private purpose which could only be raised and used for public objects. It is hardly necessary to say that a statute designed to accomplish such purposes would be against common right, and would transcend the authority conferred on the legislature by the constitution.

Two minor objections to the validity of the tax were suggested, which seem to us wholly untenable. The first is, that no part of the sum voted to be raised in June was assessed on polls. But the full sum allowed by law to be raised in any one year by a tax on polls was already included in the previous sum of nine thousand five hundred dollars, which was voted to be

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raised at the meeting in March. No further sum could be legally assessed on polls during the current year. The other objection is, that the town had no power to raise money at any meeting after the final adjournment of the annual town meeting which was held in March. No provision of law was cited in support of this objection, and we know of no reason why a town may not at any meeting duly called for the purpose, before the taxes for the year are laid, vote to raise money for a legitimate object, and include it within the amount to be assessed for the current year.

The result of the whole case is, that the vote passed at the meeting in March to raise the sum of nine thousand five hundred dollars was legal and valid, and that an assessment for that sum only, if duly laid on polls and estates, would be open to no objection; but that the vote passed at the meeting in June, having included a sum which the statute did not authorize the town to raise by taxation, and which the legislature had no power to enable a town to include in an assessment, is illegal and void. It necessarily follows that, as the assessment which was actually laid embraced the illegal as well as the legal portion of the sum voted and appropriated by the town, the whole assessment is invalid, and the injunction heretofore issued to restrain and prevent its collection and enforcement must be made perpetual. The assessors of the town, however, can proceed at once to assess the sum voted at the meeting in March without further action by the town. But no sum can be assessed for the refunding of bounties, unless a new appropriation shall be made for that purpose. As the previous vote passed for this object included also the sum paid for substitutes, it cannot now be known that the town would have made any appropriation whatever, at the meeting in June, if the latter sum had been excluded. *Injunction made perpetual.*

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## William A. Wheeler *vs.* City of Worcester.

If the rightful flow of the water of a stream is obstructed by the joint action of several parties, although not acting in combination or by concert, it is no defence to the maintenance of an action against one of them that all are not joined as defendants; but this objection goes only to the damages.

A city is not liable in an action at law for an injury to a private person by the obstruction of the flow of the water of a stream, caused by an increase of the surface wash from the streets into the same, if such increase is only the natural result of the growth of the city, or by the emptyings of the sewers into the same, if these are no greater than would otherwise have been carried in by surface washings, and are not sufficient to exert any appreciable effect on such person; or by a bridge constructed by a railroad corporation, under the authority of its charter; or by a bridge constructed by the city, if the bridge when built was sufficient to allow the free flow of the water as the stream then was, or with such changes as were likely to be produced by natural causes alone, although it has proved insufficient for this purpose, with such changes as have been produced by the exercise by a railroad corporation of its chartered rights, or by the wrongful acts of individuals.

Tort to recover damages for the wrongful obstruction of a stream, whereby the water was set back and the plaintiff injured. The case was referred, in this court, to John Wells, Charles S. Storrow and Asaph Wood, as auditors, with an agreement that their determination of the facts should be conclusive, subject to the decision of the court upon such questions of law as might be reported.

The auditors made a report of the facts, and the questions of law which they were requested to reserve, of which the material parts are as follows.

The plaintiff seeks to recover damages for injuries to his buildings, iron castings, and material for his business as an iron and brass founder, and also for the stoppage of his works, and delays and interruptions of his business, occasioned by the flooding of his premises at various times during six years prior to the date of his writ, by the setting back of the water of Mill Brook, in the city of Worcester, through a drain which leads from beneath the basements of his buildings, and discharges into said brook. The plaintiff claims that this flooding of his premises has been substantially caused, or at least increased, by obstructions in the bed of the brook below said premises, and across its channel, for

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which the defendants are responsible, and which render them liable in this action, either for the whole of said damages, or for such portion thereof as results from causes for which the defendants are responsible.

The plaintiff complains, 1st, That the defendants constructed, as parts of their highways, artificial gutters, the water conducted by which washed in sand and gravel, and deposited large quantities thereof at particular points in the stream, thereby causing it to be filled with gravel, sand and other substances, and its bed, below and opposite to the plaintiff's drain, raised so as to obstruct the free discharge of water, and set it back upon the plaintiff's premises.

2dly, That the defendants have constructed certain underground sewers for the drainage of the city, and caused the same to discharge into the brook, whereby the channel is filled or obstructed by the sediment or deposit from said sewers.

3dly, That the defendants constructed and have maintained a bridge across said stream, below the plaintiff's premises, upon Front Street, a public highway in said city, so as to obstruct the free passage of the water in all times of high water, and thereby increase its height against the outlet of the plaintiff's drain.

4thly, That certain bridges erected by the Worcester and Nashua Railroad Corporation, for purposes both of highway and railway crossings, and adopted and used by the city for its public ways, are provided with insufficient water ways, whereby back water is caused or increased upon the plaintiff's premises.

The plaintiff's works are situated upon and below the outer angle of a bend in Mill Brook, upon land which was formerly a meadow, subject to frequent overflow at all times of high water. He became sole proprietor and commenced his present works in 1835, but had previously been interested in some business upon the premises as early as 1823. In 1828 the Blackstone Canal was constructed. The upper lock of the canal was at what is now called Fox's Dam, about a mile below the plaintiff's works. The canal terminated at or near the lower line of the plaintiff's land with an excavated basin, into which the plaintiff made the outlet of his drain, having a fall of about a foot in two hundred

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and fifty feet. The brook left the plaintiff's land, passing away from his upper line, and returning entered the canal at some distance below his original lower line. In consequence of the broad and deepened channel afforded by the canal, which also cut through a gravelly ridge at the lower end of the meadow, the water was taken off more readily than before, and little or no inconvenience was suffered from floods, so long as the canal was used and kept dredged by its proprietors.

The plaintiff's original buildings were placed wholly above the surface of the ground, no excavation being made except for the walls. After he became sole owner, about the year 1838, he built other buildings, for whose basements he made excavations about two feet in depth. His drain was made to take the water which might come in from the ground beneath these basement rooms. The floors are about one foot below the level of the stream as it passes the upper line of the plaintiff's land. These basements were originally occupied, but for several years have been too wet, and have been abandoned.

In 1846 the use of the canal was discontinued. In 1849, the plaintiff, having purchased the land, which included the head of the canal, from his own land down to the point where the brook entered it, a distance of about three hundred and fifty feet, filled up the basin and canal, extending his drain and making its outlet into the brook at the point where it entered the canal; having a fall of about one foot in the whole distance. Since 1838 the lands on both sides of the stream have been laid out in lots and built upon; streets have been established, raised and graded, and the whole territory has gradually become densely occupied.

Directly after the discontinuance of the canal in 1846, a stone bridge was built by the city across it, in Front Street, about ninety rods below the present outlet of the plaintiff's drain. The waterway of this bridge is much narrower than that of the bridge which previously crossed the canal. The plaintiff claims that it is not of sufficient width and capacity for the stream in high water. In 1849 or 1850 the Worcester and Nashua Railroad Corporation constructed two other bridges across the stream, within a short distance below the outlet of the plaintiff's drain,



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for the purposes both of the railway and highway crossings. The waterways of these bridges are about two feet wider than that of the Front Street bridge, but of much greater length. In 1851 the principal sewer was constructed, discharging into the brook under the Front Street bridge. Since the discontinuance of the canal, the channel has become filled with sand, gravel, bricks, stones and rubbish of all kinds, washed or thrown in, so that at the upper end, by the outlet of the plaintiff's drain, the bed of the stream is now three and a half feet higher than the bed of the old canal. It has also been narrowed by walls, embankments, buildings and other structures, regular and irregular, and in various ways its capacity freely to carry off the water, when there is an excess, is very materially diminished and limited. The lock has been used as the flume or bulkhead of a mill called Fox's Mill, and a dam or waste pour-over maintained there, by which the water has been kept up; and the owners of the mill claim the right so to maintain it.

The evidence satisfied us that the plaintiff has suffered serious injuries in his property from the water set back upon his premises, within six years, which would not have occurred in the condition of things as they were in 1846. We estimate the damage for these injuries at $1500.

The positions of law, presented and relied on by the plaintiff, were: 1. If either of the three causes of obstruction complained of as before stated, or all of them combined, were substantial contributing causes of the flooding of his premises and the injuries to his property, then the defendants are responsible for all the damages occasioned by such flooding.

2. If either or all of these causes combined contributed in any degree to produce the flooding, or to increase its height and effects, then the defendants are liable at least for all damages occasioned by such increased height and effects, or such proportion of the whole damages as can be attributed to these causes

3. If the proportion to be attributed to these causes cannot be ascertained, the plaintiff is entitled to judgment for nomina. damages in his favor.

4. It was the duty of the city to construct its bridges so as

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not only to provide for the condition of things at the time of construction, but also for future contingencies. If not now suitable for the proper discharge of the water, on account of the filling up and narrowing of the channel, and these changes were reasonably to be anticipated, the city is liable for the consequences of their present insufficiency.

5. If the city use the brook for the discharge of their sewers, it is their duty to remove all accumulations made by them in the channel of the brook, which may tend to diminish its capacity for the passage of the water of the stream.

6. The city having adopted and used the bridges over the brook upon Exchange Street and Bridge Street, for those highways, is responsible for any defect or insufficiency in their construction or state of repair, by which the water of the stream is obstructed and set back upon the plaintiff.

The defendants presented and relied upon the following positions: 1. If the bridge on Front Street is so constructed as to take the ordinary flow of the stream, at the different seasons of the year, without serious interruption or impediment, that is all that is necessary.

2. If the bridge was so constructed that the waterway would properly carry off all the water as the channel and flow of water were in 1846, when it was built, and would do the same now, if the channel were cleared of other obstructions which have since been placed in its bed and along its banks by individuals and causes over which the city has no control, then the defendants are not under obligation to build a new bridge, or responsible in damages to the plaintiff, although it should be found that the effect of its waterway, operating with the other obstructions, in the present condition of the channel, is to increase the height of water at the outlet of the plaintiff's drain, and add to the extent of the flooding and injury to his premises.

3. Upon the facts in the case, the city cannot be chargeable with any liability for the bridges on Exchange Street and Bridge Street, which were constructed by the railroad corporation.

4. If the sewers, being constructed under authority of the statutes, were properly constructed of which no question has

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been made, the city is not responsible in this action for any incidental consequences of their operation by depositing sediment and sand in the channel of the brook; nor would the city be liable in any form of action if the sediment, sand, &c., deposited by the sewers, were less than the deposits caused by the surface flowage.

5. The plaintiff has shown no right, by prescription or otherwise, to enter his drain into the canal, nor to have the benefit of its channel, nor of the channel of the brook for underground drainage; and as the injuries for which he claims damages arose, not from any overflow of the water upon his grounds by the surface, but only from its setting back through his underground drain, he has no right of action.

6. If the plaintiff had any such right of drainage, he had also the right to enter below and clear out obstructions; and if, by so doing, or if, by providing a gate or flap in his drain to prevent back water, he might have avoided the injuries he has suffered, he cannot recover damages for those injuries from the city.

7. Inasmuch as the causes of obstruction of which the plaintiff complains in this case are at most merely contributing causes, operating with others more directly efficient, for which the abutters upon the stream or other individuals, and not the city, are responsible, and over which the defendants have no control, and as no means are afforded to determine what part or how much of the damages are due to each, and there is no evidence of combination or concert, no damages can be assessed against the city.

Upon a careful consideration of the evidence applicable to these several positions of the parties, we have arrived at the following conclusions of fact.

First. That the filling up of the bed of the channel, formed by the old canal, was a natural and inevitable consequence of the discontinuance of its use as a canal, and the continued maintenance of the lock for Fox's Mill.

Secondly. That the surface wash from the streets has contributed materially to this result; hastening the operation by the

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large amount of deposit that is carried from them into the stream. But we also find that the brook is the natural means of escape for the water which accumulates upon those streets, and that this wash is incidental only to the growth of the city and the construction of its streets.

Thirdly. That the deposits from the underground sewers have also contributed, in some measure, to the filling up of the bed of the brook; but we are of opinion that the sediment carried by them into the brook is less in amount, and less injurious in kind, than would be carried in from the surface by the same water, if the sewers had not been made. We do not find that their deposits have been so considerable as to form any substantial part of the causes of the flooding complained of, or to exert any appreciable effect upon the plaintiff.

Fourthly. That Front Street bridge, in the present condition of the channel at, above and below it, does tend, in freshets, to increase the height of water above, by checking its free passage, so as to effect, in some degree, the height of water at the outlet of the plaintiff's drain, and increase the back water upon his premises. In consequence of the filling up the channel, the water, in its ordinary stages, stands up to the point of the springing of the arch of the bridge. The arch is a segment, considerably less than a semicircle; so that, as the water rises, the width of the surface passage contracts rapidly. If the banks of the stream were free and its channel cleared to the same depth as in 1846, when the bridge was built, the effects would be much less, and would probably not sensibly affect the plaintiff's premises.

Fifthly. That the direct and most efficient causes of the flooding of which the plaintiff complains are: 1. The confinement of the stream to a narrow channel, by the buildings, embankments and walls which have been constructed along both sides of the brook by the riparian occupants, and parties other than the city; including the abutment and arches of the bridges built by the Worcester and Nashua Railroad Corporation, as before stated. 2. The filling up of the bed of the channel. The sediment from the sewers, and still more, the surface wash from the streets, contribute to this condition. But the chief and by far

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the most efficient cause of this difficulty arises from the acts and neglects of the riparian occupants, and parties other than the city, who make the brook a receptacle for all kinds of waste material. 3. Obstructions in and over the channel, placed or permitted by riparian occupants.

Sixthly. The lock gate being retained and used for mill purposes, the difference of level between the surface of water there and at the outlet of the plaintiff's drain is so slight that, in our opinion, no complete and permanent relief from the difficulties which the plaintiff and other proprietors upon the stream suffer from the frequent flooding of their premises can be secured without the removal or reduction of those gates.

Seventhly. The bridges at Exchange Street and Bridge Street are also contributing causes of the flooding of the plaintiff's works. These bridges were built by the Worcester and Nashua Railroad Corporation, for the purposes both of railway and highway crossings, and have been and are used by the city as a part of those public streets.

Eighthly. Upon the question of the plaintiff's right to enter the stream with his drain, no fact appeared other than what is contained in the foregoing statement, except that the plaintiff testified in cross-examination that he had no arrangement with the owners of the canal as to the discharge of his drain into the canal basin.

Ninthly. There is no evidence by which we can apportion the damages hereinbefore estimated by us, or determine what part or how much of the injury, for which it is assessed, was caused by or is attributable to either or all of the causes for which it is claimed that the defendants are responsible; and we are of opinion that, in the nature of the case, it is impossible so to apportion the damages.

The case was reserved for the determination of the whole court.

*F. H. Dewey & G. F. Hoar*, for the plaintiff. The gist of the action is the obstruction of the rightful flow of the water. The existence of the excavation for drainage is incidental merely and is offered as aggravation of damages. The defendants

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have caused the water to set back upon the plaintiff in four ways.

1. By the Front Street bridge. It appears that this bridge does increase the back water upon the plaintiff's premises. The right to construct highways does not include the right so to construct bridges as to set back water upon lands beyond the limits of the way. *Lawrence* v. *Fairhaven*, 5 Gray, 110. *Perry* v. *Worcester*, 6 Gray, 544. *Parker* v. *Lowell*, 11 Gray, 353. *Rowe* v. *Granite Bridge*, 21 Pick. 344, 348. For an obstruction of the flow of the water so caused, an action will lie. And it is not enough for a town to build its bridge with sluice ways which are sufficient in the first instance; but it is bound to keep them so. *Lawrence* v. *Fairhaven*, above cited. The defendants have shown no justification. None of the elements of the case supposed by the prayer for instructions in *Sprague* v. *Worcester*, 13 Gray, 193, exist here. On the other hand, the causes of the filling up of the bed of the channel were in operation when the defendants built the bridge, and should therefore have been anticipated and provided for. The defendants did not perform their duty merely by constructing a culvert sufficient to discharge the water for the time being. They were bound to keep the water way ample. Nor can the defendants escape liability because the injury cannot be exactly apportioned. The city can maintain an obstruction to a watercourse in the exercise of its right of eminent domain, only in cases where it is clearly reasonable and necessary, and works no injury to private rights.

2. By the railroad bridges. These bridges are maintained for a purpose common to the city and the railroad company, and their original construction, though at the cost of the railroad, was in the exercise of the power vested by law in both. This liability is recognized by Gen. Sts. *c.* 63, § 67, providing a remedy over.

3. By the deposits from the sewers. The auditors report that these deposits contributed to filling up the bed of the brook, and that this filling up contributed to the flooding of the plaintiff. When they further say that these deposits have not been so considerable as to form any substantial part of the causes of the flooding, or to exert any appreciable effect upon the plaintiff,

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they must mean that these deposits do not affect the plaintiff's premises in and of themselves, except as combining with the other causes named. The city had no right to take private land for sewers, there being no provision for compensation. *St.* 1848, *c.* 32, § 14. Gen. Sts. *c.* 48, §§ 3–7. *Bloodgood* v. *Mohawk & Hudson Railroad*, 18 Wend. 9. *Rexford* v. *Knight*, 1 Kernan, 308. *Cushman* v. *Smith*, 34 Maine, 247. Nor can they so construct sewers as to create a nuisance to private lands, or disturb a private easement. *Child* v. *Boston*, 4 Allen, 41, and cases cited. *Eastman* v. *Meredith*, 36 N. H. 284. The principal sewer empties under Front Street bridge. It does not avail the defendants that this deposit is less in amount than would be carried in by the ordinary surface wash. It is no justification for an illegal act, that it does less harm than might be caused in other modes for which the law furnishes no remedy. *Chapman* v. *Thames Co.* 13 Conn. 269. *Attorney General* v. *Council of Birmingham*, 4 Kay & Johns. 528, 542. The public have no right of drainage which justifies the pollution or obstruction of the waters of a natural stream, to the injury of a single riparian proprietor. *Attorney General* v. *Birmingham*, above cited. *Stockport Water Works Co.* v. *Potter*, 31 Law Journ. (Exch.) 9. *Attorney General* v. *Metropolitan Board of Works*, 9 Law Times (N. S.) 139.

4. By constructing artificial gutters above ground, for the surface wash. This ground of claim depends on substantially the same principles with that for the injury caused by Front Street bridge.

*B. F. Thomas & P. E. Aldrich*, for the defendants.

Colt, J. The plaintiff is a riparian proprietor upon Mill Brook, a natural watercourse flowing through the city of Worcester, and has the right to have it flow through and from his premises in a free and unobstructed channel. He may maintain this action against those parties who interfere with that right, or against any one of them who by his unlawful act contributes substantially to the injury which he suffers, unless the party or parties charged with creating the obstruction can claim the protection of the statutes known as the mill acts, or those other statutes which provide compensation in a particular mode for

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injuries done by public authority in the exercise of the right of eminent domain. If the injury is produced by the joint action of several parties, and especially if it is the result of the independent action of several parties contributing thereto, though not in combination or by concert, it is no defence that all are not made defendants; for when the injury does not arise from privity of contract, but is a mere misfeasance, misjoinder of defendants cannot be availed of to defeat the action. The suggestion that the damage to the plaintiff is produced by the independent acts and trespasses of others can be considered only upon the question of damages.

The report of the auditors establishes the fact that the plaintiff within six years past has suffered serious damage by water set back upon his premises, which would not have occurred if Mill Brook had remained in the condition in which it was in 1846. The causes which have produced the injury are various, numerous, and in their combined action unusually complicated. From 1828 to 1846 the existence of the Blackstone Canal, terminating at or near the plaintiff's premises, furnished a sort of artificial channel for the brook, which to the advantage of the plaintiff was kept dredged and deepened for the uses of the canal. In that year the canal was discontinued, though the first lock gate below, which sets back water to near the outlet of the plaintiff's drain, was continued by law for mill purposes, and has since been and is now so used. The discontinuance of the canal and the continuance of the dam at the lock gate it is found naturally and inevitably caused the filling up of the bed of the channel, so that no complete or permanent relief can be had to the plaintiff without the removal or reduction of the dam.

In 1846, the year of the discontinuance of the canal, Front Street bridge was built by the defendants across the brook, at a point below the plaintiff's premises, upon a public street of that name; and such is the size and form of its arch that, in connection with other causes, it now tends in freshets to increase the height of the water above, so as to affect in some degree the height at the outlet of the plaintiff's drain, and increase back water on his premises.

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In 1849 or 1850 the bridges on Exchange and Bridge Streets were constructed by the Norwich and Worcester Railroad, and are described as direct and efficient causes of the flooding, in connection with the encroachments which have from time to time been made upon the stream by buildings, embankments and mills, on both sides, constructed by riparian proprietors and parties other than the city, and by obstructions in and over the stream, placed there by such parties.

The report finds that the chief and by far the most efficient cause arises from the acts and neglects of riparian occupants and parties other than the city, who make the brook a receptacle for all kinds of waste material, so that since the discontinuance of the canal the channel has become filled with sand, gravel, bricks, stones and rubbish of all kinds, washed or thrown in, making at the outlet of the plaintiff's drain the bed of the stream three and a half feet higher now than the bed of the old canal.

During this time, the surface wash from the streets of the city rapidly enlarging their limits, and to some extent the sediment from the underground sewers which it is inferred have been constructed by the city since 1846, have contributed to the filling up of the channel.

Of these coöperating causes, thus briefly indicated, the case requires us to consider only those which it is alleged the city is responsible for.

1. The surface wash from the streets. This is stated to be incidental to the growth of the city and the construction of the streets. It finds its way naturally into Mill Brook, which furnishes the only channel for the accumulated surface water of the vicinity. No new watercourse has been diverted into it. It receives no more water than would be collected by the natural surface of the land, but, by the changed uses to which a dense population have appropriated it, the soil of the numerous streets has been more rapidly carried into the stream. To hold the defendants liable to an action from such cause would be to say that the owner of land must be restricted to such uses of it as will not, by the ordinary action of the elements, cause the soil to

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wash in and fill to any increased extent the adjacent brooks and streams. The injury which results to the plaintiff from this cause must be regarded as *damnum absque injuria*. There is another answer to this claim of the plaintiff. The city, by their proper authorities and agents, are charged with the public duty of constructing and maintaining the public streets. They must construct and maintain them in such places and in such manner as the public convenience and necessity require. They must provide for and dispose of the surface water which falls upon them, and, in the discharge of this duty, neither the city nor their agents can be proceeded against in an action of tort for damage sustained by a private citizen. In the construction of streets, highways and bridges, it is the right of the public to take all private property necessary, and do all other necessary incidental damage to the individual. The laws of the Commonwealth provide compensation for such injury, but the remedy must be sought in the manner pointed out by the statutes, and not by action of tort against the city or their agents. If the public work is built so as to cause unnecessary damage by want of reasonable care and skill in its construction, then the right of eminent domain will not protect the parties by whom the work is done, but they may be liable in tort for such unnecessary injury. The case does not find that the surface wash from the streets was not the necessary and inevitable consequence of their construction, or that the streets were laid out and built without reasonable care and skill. *Flagg* v. *Worcester*, 13 Gray, 601. *Sprague* v. *Worcester*, Ib. 193. *Perry* v. *Worcester*, 6 Gray, 544. *Parks* v. *Newburyport*, 10 Gray, 28. *Mellen* v. *Western Railroad*, 4 Gray, 303.

2. The report finds that the deposits from the underground sewers have contributed in some manner to the filling up of the brook, but that the sediment carried by them into it is less in amount and less injurious in kind than would have been carried in from the surface by the same water, if the sewers had not been built; and further, that these deposits have not been sufficient to exert any appreciable effect on the plaintiff; and this seems to dispose of this cause of complaint upon two good grounds.

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3. The bridges at Exchange and Bridge Streets it appears are so built that their abutments and arches are direct and efficient causes of the plaintiff's injury. They were built by the railroad corporation for the purpose of both railroad and highway crossings, and we must presume were built under the authority of the charter and the laws of the Commonwealth. The city has no power to prevent or to dictate the mode of their erection. This was a matter over which the county commissioners had exclusive jurisdiction in the last resort. The assent of the mayor and aldermen would not render the city responsible. They were not agents of the city for such purposes. Nor would the use of these bridges for public travel to which they were adapted make them structures, for a defect in the original erection of which the city would be responsible. The only party at fault is the railroad corporation. If constructed with reasonable care and skill, the plaintiff's remedy for an injury caused by them would be, as before suggested, by application for damages to the county commissioners. If the work was not authorized by the charter or was improperly executed, an action of tort might be sustained against the party in fault. It does not follow necessarily, from the fact that injury to the plaintiff is occasioned by these bridges, that any one is liable in this form of action. *Sts.* 1846, *c.* 271; 1849, *c.* 159. Gen. Sts. *c.* 63, §§ 55, 62. *Sawyer* v. *Northfield*, 7 Cush. 490. *Gardiner* v. *Boston & Worcester Railroad*, 9 Cush. 1. *Mellen* v. *Western Railroad*, 4 Gray, 301. *Vinal* v. *Dorchester*, 7 Gray, 421. *Child* v. *Boston*, 4 Allen, 41.

4. The only remaining obstruction which is charged upon the defendants is the Front Street bridge. This structure was erected by the city authorities for the accommodation of the public travel. They were bound to construct it with reasonable care and skill, providing waterways sufficiently capacious to accommodate the flow of the stream at all seasons of the year, and all times of ordinary high water or freshets. The considerations above stated apply here. If this bridge was properly built, then, though the plaintiff suffers, his remedy is not by an action of this description. But without depending upon this view of the case as respects this bridge, we think there are not

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facts enough disclosed in the report to justify charging the defendants with any part of the damage to the plaintiff caused by defect in its construction. The burden of proof is upon the plaintiff. He must make out his case. The facts found must be such as to satisfy us reasonably of the defendants' fault, and that their fault contributed appreciably to the plaintiff's damage. The report finds that if the stream were now in the condition in which it was in 1846, when the bridge was built, the bridge as it stands would probably not sensibly affect the plaintiff's premises; and that if the bridge were enlarged or removed, the water would still continue to set back upon the plaintiff's premises, by the other causes named. To this the plaintiff answers that the city was bound to provide for such future alterations in the character of the stream as could reasonably be anticipated. As to changes produced by natural causes alone, this may be true. But it cannot be required of the city that they should have built this bridge in anticipation of changes and obstructions produced by the exercise of the chartered rights of other corporations, or the mere trespasses of riparian proprietors unlawfully filling up and encroaching upon the stream. We cannot construe the report as affirmatively showing that this bridge, in connection with natural causes, or others which might reasonably have been anticipated when the bridge was built, and independently of those causes which have arisen since from the acts of others than the city, would have caused any appreciable damage to the plaintiff. *Lawrence* v. *Fairhaven*, 5 Gray, 110. *Rowe* v. *Granite Bridge*, 21 Pick. 348. *Sprague* v. *Worcester*, 13 Gray, 193.

In the result to which we come, it is not necessary to consider the ground, much relied on by the defendants, that the plaintiff contributed to his own injury by excavating his basement and extending his drain after the discontinuance of the canal in 1846. *Judgment for the defendants.*

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# INDEX.


## ACTION.

see MORTGAGE, 17; NEGLIGENCE.

## AGENCY.

See PRINCIPAL AND AGENT.

## ANTE-NUPTIAL CONTRACT.

An ante-nuptial contract by which a woman agrees to relinquish her distributive share of her intended husband's estate will be enforced in equity, if entered into understandingly, for an adequate consideration, and without fraud or misrepresentation on his part. *Tarbell* v. *Tarbell*, 278.

## APPEAL.

An appellant from the judgment of a justice of the peace or police court in a civil action need not recognize for the prosecution of his appeal and the payment of such costs as may thereafter arise, unless required to do so by the adverse party, under Gen. Sts. *c.* 120, § 26. *McKeag* v. *O'Donnell*, 543.

## ARBITRAMENT AND AWARD.

1 If a submission to arbitration, in addition to a statement of the matter submitted, contains the facts out of which the question arose, and the grounds on which each party relies, and the arbitrator, being at a distance from the parties, writes to the party sought to be charged, inquiring if it is the wish of the parties to meet him in person and state their own cases, or if he should decide the case from the facts signed by them, and informing him that the other party will be there at a specified time, and that party replies to the arbitrator that he expects to have a hearing, and, as it is not convenient for him to meet the other party at the place of the arbitrator's residence at this time, he will try and state his side, and thereupon proceeds to state his views, this may be taken as a waiver of a further hearing, and the arbitrator is authorized to consider the case and make his award. *Page* v. *Ranstead*, 295.

2. A. and B., in a submission to arbitration, stated that B. had agreed to furnish and deliver to A. a raft of pine timber at a specified price; that at the time of making this contract B. made an agreement, to which A. was a witness


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with another person to get out the timber; that the third person failed to get out the timber; that B. claimed that by general custom in that region the failure of the third person absolved B. from his agreement, which A. denied; and that the question for the arbitrator to decide was, "Has A. a claim on B., and if so, to what amount?" Some months afterwards the arbitrator wrote to B. asking if it was the wish of the parties to meet him in person and state their own cases, or if he should decide the case from the facts signed by them, and informing him that the other party would be there at a specified time. B. replied, that he expected to have a hearing, and as it was not convenient for him to meet the other party at the place of the arbitrator's residence then, he would try and state his case; and he thereupon proceeded to state his views of the case. *Held*, that this might be taken as a waiver by B. of a further hearing, and that the arbitrator was thereupon authorized to consider the case and make his award. *Ib.*

## ASSUMPSIT.

1. The Commonwealth undertook to aid a railroad corporation by the issue of scrip upon certain terms and conditions, for the sum of $2,000,000, payable in thirty years from date, "which may be expressed in the currency of Great Britain and payable to the bearer in London, or issued in federal currency, payable in Boston, as the directors of the corporation might elect when they should apply for each issue of the scrip." The corporation agreed with contractors that the whole of the state scrip that might be issued should be exclusively appropriated to work done or to be done, in compliance with the terms and conditions of the legislative act authorizing the loan of state credit, and that the same should be promptly handed to the contractors. The corporation accordingly from time to time gave orders for the delivery of the scrip to the contractors, who elected to receive it in the currency of Great Britain, and in ascertaining the amounts each pound sterling was reckoned at $4.44, and the scrip was issued on that basis, upon orders of the governor and council and certificates of the state engineer, which were expressed in dollars. During all this time the equivalent in this market for a pound sterling was about $4.91. The contractors sold the scrip for less than its par value. *Held*, that the Commonwealth might maintain an action for money had and received against the contractors, to recover back the excess received by them upon the sale of the scrip, over the amount at which it was reckoned when it was issued. *Commonwealth* v. *Haupt*, 38.

2. If goods are sent by a carrier, and neither the bill of lading nor the direction upon them enables him to deliver them to the purchaser, and they are lost in consequence, the purchaser may recover back the price paid by him to the vendor for the same; nor will he be presumed to have assented to or waived the vendor's omission, from proof that he received a copy of the imperfect bill of lading before the payment was made, and that he thereafter made diligent inquiry to find the goods. *Finn* v. *Clark*, 479.

3. If labor has been performed and materials furnished by A., in the erection of a building for B., who has executed a written promise to pay a certain sum

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therefor, "provided the roof under and around the belfry deck does not leak, and provided further that the plastering on the church said A. built for said B. proves not to be injured by the frost," the acceptance of such written promise will not prevent a recovery for the value of the labor, on a *quantum meruit*. *Thompson* v. *Purcell*, 426.

4. If A. advances money to B. and takes a conveyance of land from B., absolute in form, and at the same time executes an agreement to reconvey the same within two years if so requested, and not otherwise, upon repayment of the sum so advanced, with interest, A. has no right of action to recover back the money advanced by him, nor can he be allowed to prove by parol evidence that the transaction was intended by both parties as a loan. *Waite* v. *Dimick*, 364.

5. If a tax title proves invalid, the purchaser at the collector's sale cannot maintain an action against the town to recover back the money paid by him as the consideration of the purchase, and the expenses of defending his title. *Lynde* v. *Inhabitants of Melrose*, 49.

See TAX, 6.

ATTACHMENT.

1. If a debtor who resides in another state is fraudulently induced by procurement of his creditor to bring into this commonwealth property which by the laws of the place of his residence is exempt from attachment, in order that it may be attached here, and the same is accordingly so attached, the attachment is void; and both the creditor and the officer who makes the attachment are liable in damages as trespassers, although the officer did not know of the fraud and simply obeyed the terms of his precept. *Deyo* v. *Jennison*, 410.

2. An officer who, in returning an attachment of fifty tons of pig iron, certified that he could not remove it on account of its weight and bulk, and thereupon posted the notice and deposited the copy required by Rev. Sts. *c.* 90, § 33, and did not take the iron into his actual custody, is not responsible, in the absence of any evidence to show that he might have immediately removed it, if without his consent or knowledge it is afterwards taken away so that it cannot be found to be taken on execution. *Scovill* v. *Root*, 414.

3. Under Gen. Sts. *c.* 123, § 54, Sundays and fractions of a day are excluded in reckoning the three days allowed for recording an attachment. *Hannum* v. *Tourtellott*, 494.

See EVIDENCE, 3; MORTGAGE, 18; SHERIFF, 2.

AUDITOR.

An auditor appointed to state the account between the parties to a bill in equity to redeem land from a mortgage may properly hear evidence and report upon an agreement made by the mortgagor, after interest had accrued upon the debt secured by the mortgage, to treat the principal and accrued interest as a new principal, upon which interest should be thereafter computed; and such agreement, so far as it has been executed, is valid. *Quimby* v. *Cook*, 32.

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## BAILMENT.

If a horse is let to A. and delivered by the owner to B., upon the credit of A., and the horse is driven to death by B. with the assent and aid of A., who is driving another horse near by, both may be held jointly liable to the owner *Banfield* v. *Whipple*, 27.

## BASTARD.

1. No statute of limitations in this commonwealth applies to complaints for the maintenance of bastard children. *Wheelwright* v. *Greer*, 389.

2. The Gen. Sts. *c.* 72, § 2, and *St.* 1859, *c.* 239, § 3, authorizing certain officers to make a complaint for the maintenance of bastard children, if the woman entitled to make such complaint refuses or neglects to do so, do not apply to cases where bastard children were born before those statutes went into effect. *Ib.*

3. If a woman has made a complaint for the maintenance of her bastard child, and afterwards refuses or neglects to prosecute it, those statutes do not authorize the officers therein named to make a new complaint, but to prosecute the existing one. *Ib.*

## BOND.

If a sale of land has been made, under a power of sale contained in a mortgage, for less than the amount of the mortgage debt, and the mortgagee, after receiving the full amount of the balance due from the mortgagor, executes to him a bond with condition to indemnify and save him harmless from all damage, loss or prejudice arising from the debt and mortgage, and from the sale of the land, and all expenses and damage that may arise in consequence of said sale, the condition of the bond is not broken so long as the mortgagor is not disturbed in his possession of the land, or in any way molested or put to expense. *Gerrish* v. *Smyth*, 303.

## BOSTON AND ROXBURY MILL CORPORATION.

The right of the Boston and Roxbury Mill Corporation, under *St.* 1814, *c.* 39, § 2, to maintain the canal and dike therein authorized was not taken away by *St.* 1833, *c.* 120, annulling their right to build a dam from Boston to South Boston, or by their release to the Commonwealth in 1854 of lands and flats in the "empty basin." *Tremont Improvement Co.* v. *Boston Water Power Co.* 261.

## BY-LAW.

If, under a charter authorizing the same, a city ordinance is passed which prohibits the obstruction of any street for the purpose of building, "without first obtaining a written license from the mayor and aldermen, or some person authorized by them," and complying with such reasonable conditions as they may impose, the mayor alone has no authority to grant a license to obstruct a street for the purpose of building, or to impose conditions therefor; and an agreement, made in consideration of such license from the mayor alone, to indemnify the city against damages that may arise in consequence thereof, is without consideration and void. *City of Lowell* v. *Simpson*, 88



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## CHARITABLE TRUSTS.

1. A bequest of an annual sum, out of the income from real estate, for fifty years to trustees, to be invested by them and accumulated during that time, and then applied to establish a charity, is a valid bequest; even if the accumulation cannot be allowed for so long a period. *Odell* v. *Odell*, 1.

2. What is the legal limit of accumulation for a charity, *quære*. *Ib.*

3. A will contained the following bequest: "I give to the trustees of the Salem Savings Bank in trust one hundred dollars annually for fifty years, to be paid to them by my executors, to be safely invested by said trustees, the interest to be added to the principal by them semi-annually. At the expiration of fifty years the sum which shall have accumulated shall be appropriated by a society of ladies from all the Protestant religious societies in Salem to provide and sustain a home for respectable, destitute, aged, native-born American men and women. The above annual payment shall be made from the income of my real estate, which real estate shall be held in trust by my executors, until the last payment shall have been made to the trustees of the Salem Savings Bank; then my real estate shall be divided equally among the grandchildren of my late brother James." *Held*, that this was a valid bequest, even if the direction for accumulation was invalid. *Ib.*

4. A testatrix by her will gave all her real and personal estate, after payment of debts and funeral expenses, to a town, for the purpose of establishing, for the use and benefit of all the inhabitants of the town, a free public library, and, if the funds should prove sufficient, a free public reading-room, to be under the control of trustees to be chosen by the inhabitants from time to time, which trustees were directed to sell certain of the real estate and empowered in their own names to convey the same, and were also directed to convert the personal estate into money and pay her debts and funeral expenses, and to appropriate the residue to the purposes above named by erecting a building, buying books and setting apart a fund for the future purchase of books and the establishment of a reading-room; and she provided that the town should forever pay all the incidental expenses of managing and insuring the library and building. The town at first voted to accept these provisions, and chose trustees accordingly; but afterwards reconsidered this vote, and voted to decline to accept the same. *Held*,

(1.) That the will gave the estate to the town in fee.

(2.) That it was the duty of an administrator with the will annexed to collect the personal assets and pay the debts and funeral expenses of the testatrix, and that the direction to the trustees to do these things was inoperative and void.

(3.) That the trustees were vested with a power, coupled with a trust, which entitled them to seek the instructions of this court as to the proper discharge of their duty.

(4.) That under Gen. Sts. *c.* 100, trustees for charitable trusts need not give bonds.

(5.) That the trusts created by this will were charitable trusts, although a burden was annexed to the acceptance thereof by the town.

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(6.) That the town had power to accept the same; and after doing so cannot renounce the same.
(7.) That the town, by accepting these provisions, could not bind itself to expend more money than is allowed by Gen. Sts. c. 33, § 9, for that purpose.
(8.) That the charitable trusts will not be defeated nor the estate forfeited by a failure on the part of the town to pay the expenses put upon them by the will. *Drury* v. *Inhabitants of Natick*, 169.

See WILL, 8.

COLLATERAL SECURITY.

See EQUITY, 3.

COMMON CARRIER.

See ASSUMPSIT, 2.

COMPLAINT.

1. A plea of guilty before a magistrate cannot be withdrawn after the case has been carried to the superior court on appeal, without leave of that court; and if leave to withdraw the plea of guilty has been refused in that court, and a jury empanelled in the case, they may properly be directed to return a verdict of guilty, without the introduction of any evidence on the part of the Commonwealth. *Commonwealth* v. *Hagarman*, 401.
2. A complaint which charges the commission of a continuing offence from a day named "unto the day of the date hereof," and which is dated "this fourteenth day of January A. D. 1864," alleges the time with sufficient certainty, and is not bad by reason of the use of the figures. The date of the jurat may also be expressed in figures. *Ib.*
3. If a complaint against John Smith for a criminal offence contains several counts, and the first count contains his name in full, the subsequent counts may describe him as "the said John," although the complainant's first name is also John. *Ib.*

CONTEMPT.

See SHERIFF, 1.

CONTRACT.

1. An agreement, made for a valuable consideration, to pay a certain sum of money at the promisor's death, with a gross sum for interest thereon, is valid and binding upon his executor, and is not usurious, although at his death the legal interest would not amount to so much as the sum named for interest. *Parker* v. *Coburn*, 82.
2. A written contract for the purchase and sale of land within ten days is to be performed within ten days from its date, and not from its delivery, unless so much time has passed before the delivery as to make the performance within that time impossible or unreasonable. *Goldsmith* v. *Guild*, 289.
3. The doctrine that time is not of the essence of a contract in equity should not be applied, as a general rule, to sale of land in this country. *Ib.*

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4. If in a particular religious denomination the pastor furnishes the organist, and accordingly agrees with an organist for a certain time at a specified price, and dies before the expiration of the time, and the church is subsequently closed, his estate is only liable to pay for the time of the organist's actual services, with interest after a demand; although the organist was ready to play afterwards. *Harrison* v. *Conlan*, 85.

5. If upon the dissolution of a firm the partners who remain assume the payment of the partnership debts and agree to save the retiring partner harmless therefrom, and a judgment is subsequently recovered against all of them upon one of the partnership debts, and the retiring partner pays a portion of the amount to the judgment creditors, taking from them an agreement in which they, in consideration of the payment to them, covenant not to molest him or take his property thereon, reserving all their rights against all the other judgment debtors, he may recover the amount so paid by him in an action against his former partners. *Brewer* v. *Worthington*, 329.

6. A contract by which B. agrees to deliver to A., upon the formation of a certain corporation, a certain amount in the stock of the same, "at *pro rata* of $250,000 valuation," and A., in consideration of the delivery of said stock, agrees to sell and collect a certain amount of the stock, upon the above valuation, does not imply that the capital stock shall be limited to the amount named, nor does the organization of a corporation with a larger capital stock disable A. from performing his part of the contract. *Murdock* v. *Caldwell*, 299.

7. If the owners of mineral lands enter into a written agreement with another person, reciting their purpose either to sell the lands or form a joint stock company for working the mines thereon, and promising, in consideration of services rendered and to be rendered by him, to pay to him a certain sum "out of the proceeds of the sale of said lands, if the same shall be sold, or, if the lands shall not be sold, and a company shall be formed for working the mines thereon," then to convey to him stock to that amount, "it being understood and agreed by and between the parties hereto that the foregoing amount, whether of cash or stock, is to be a charge on the joint estate" of the owners; and he, in consideration of the foregoing agreements, promises to remain in their service as long as they may require, not exceeding one year, for a salary of $100 per month and a house and land free of rent; the owners of the land are not bound to sell the same or to form a joint stock company until by the exercise of reasonable diligence they are able to do so advantageously, having reference to the interests of all the parties; and until such sale or the formation of such a company, or the existence of some negligence on their part, he has no claim against them, except for the stipulated salary. *Pinch* v. *Anthony*, 470.

8. A., who owned a wharf, and B., who owned a stone quarry, signed and sealed an agreement together, providing as follows: B. agreed to carry all the stone quarried on his premises, that was to be carried away in vessels, to A.'s wharf, for nine years, and pay four cents per ton wharfage; and to continue to carry all the stone quarried there, that was to be carried away in vessels, after the expiration of nine years, and pay five cents per ton wharfage. A. agreed to receive said sums in full compensation for the wharfage, and to furnish and prepare a

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place to deposit ballast, and to keep his wharf and dock in good repair. The agreements on each side were fulfilled for nine years, after which B. sold his quarry. *Held*, that A. had no right of action to recover for B.'s failure to carry to A.'s wharf the stone quarried after the sale of the quarry, and that evidence was incompetent to show that the usual price of wharfage for the nine years was five cents a ton. *Knowlton* v. *Sewall*, 34.

9. The plaintiffs, who were shipbuilders, wrote to the defendants, who were iron merchants, saying, "We are ready for iron and spikes for a vessel of three hundred tons burthen; please give me your lowest price for bolt and refined iron. I suppose I shall buy for three vessels within three months, and please consider this." The defendants replied, naming prices which were unsatisfactory to the plaintiffs. The defendants wrote again, naming a lower price, and saying, "We make this offer with the understanding the quantity will not be over about twenty-five tons." The plaintiffs replied, accepting the defendants' proposal, inclosing an order for a small amount of iron, and requesting the defendants to fill it. The plaintiffs afterwards wrote to the defendants, "I am sorry if you made the price too low, but you must stand this vessel hard or soft, for we contracted to build it in view of the" aforesaid prices. *Held*, that the contract of the defendants was limited to the single vessel referred to, and that they were not bound to furnish iron to the amount of twenty-five tons, to be used in other vessels. *Whittemore* v. *Fuller*, 361.

See ASSUMPSIT, 3, 4; BY-LAW; CORPORATION, 1, 3; FRAUDS, STATUTE OF; LEASE; LIMITATIONS; MORTGAGE, 17; PROMISSORY NOTES, 3

## CONVERSION.

See FRAUDULENT CONVEYANCE.

## CORPORATION.

1. One who sells shares of the capital stock of a corporation which has not yet issued certificates, and agrees to give the purchaser a certificate when he gets it, is not bound to pay an assessment laid upon the shares thereafter, and before the certificates are issued. *Brigham* v. *Mead*, 245.

2. Proof that a company has attempted to form an organization under the statutes of another state, and has transacted business as a corporation *de facto*, and that its certificates of shares contain a recital that it was organized under the general laws of that state, is sufficient, in the absence of anything to control it, to authorize a jury to find that the company was duly incorporated, in a case in which the fact is only collaterally in issue. *Barrett* v. *Mead*, 337.

3. A written contract for the transfer of shares in the capital stock of a company incorporated under the statutes of another state is void, under Gen. Sts. *c.* 105, § 6, unless the contracting party is, at the time of making the contract, the owner or assignee thereof, or authorized to sell or transfer the same. And it is immaterial that such contracting party had, as a broker, previously sold the same number of shares of the same corporation in violation of his instructions,

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and that he entered into the contract for the purpose of indemnifying the owner. *Ib.*

See EQUITY, 3; RAILROAD, 1–3, 5; SEAL, 1.

COSTS.

1. If a writ has been amended by striking out the name of one of the plaintiffs, on terms which have been complied with, the defendant at the termination of the case is not entitled to tax costs against the plaintiff whose name was thus stricken out. *Richardson* v. *Wolcott*, 439.
2. If a trustee process is brought against two defendants and two trustees, describing them individually and not as partners, and the trustees are summoned as partners only, the latter are entitled to only one bill of costs, although they make four different answers. *Gerry* v. *Gerry*, 160.
3. Upon a complaint to compel kindred of a poor person to contribute towards his support, the superior court have power, under Gen. Sts. *c.* 70, § 11, to award costs, and no appeal lies from their decision. *Inhabitants of South Reading* v. *Hutchinson*, 68.

COUNTERFEIT BILL.

In support of an indictment for having counterfeit bank bills, with intent to pass them, knowing them to be false, evidence is competent of previous declarations of the defendant showing that he was then engaged in the business of passing counterfeit money; but the contents of a letter, containing counterfeit money, received by him at the post-office and immediately taken from his possession before he had opened it, cannot be proved. *Commonwealth* v. *Edgerly*, 184.

CURRENCY.

See FOREIGN COINS; INSURANCE, 1.

DAMAGES.

If a case is submitted to the court upon an agreed statement of facts, in which the damages are not fixed or an assessment thereof provided for, the judgment, if for the plaintiff, will be for nominal damages only. *McAneany* v. *Jewett*, 151.

See FRAUDS, STATUTE OF; SALE, 1.

DECEIT.

If payment for goods sold and delivered is resisted on the ground, among other defences, that the plaintiff falsely and deceitfully represented them to be of a particular quality, the defendant, to support this defence, must prove not only that the representations of quality were untrue, but that the plaintiff knew them to be so when he made them; and an omission so to rule will entitle the plaintiff to a new trial, after a verdict against him. *King* v. *Eagle Mills*, 548

DEED.

See EASEMENT, 3; MORTGAGE, 1.

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## DISSEISIN.

See MORTGAGE, 6.

## DOG.

A dog at play with his owner's son upon his owner's land is not "at large" within the meaning of Gen. Sts. *c.* 88, § 58; and a constable who under such circumstances calls him away, and shoots him while he is upon his owner's land, and then enters upon such land and pursues him for the purpose of shooting him again, is liable in damages therefor. *McAneany* v. *Jewett*, 151.

## DURESS.

1. If a person has been induced by duress or fraud to settle a groundless suit against him, by indorsing a sum of money upon a note which he holds against the plaintiff therein, and he has taken a discharge of the suit, it is not necessary for him to give notice or to return the discharge, in order to entitle himself to avoid his contract. *Foss* v. *Hildreth*, 76.
2. A threat to arrest the defendant in an action for slander is a threat to make an unlawful arrest; and a contract procured by means of such a threat, if found by the jury to be sufficient to overcome the mind and will of a person of ordinary firmness, may be avoided. *Ib.*

## EASEMENT.

1. The owner of land may lawfully occupy and improve it in such manner as either to prevent surface water which accumulates elsewhere from coming upon it, or altering the course of surface water which has accumulated thereon or come upon it from elsewhere; although the water is thereby made to flow upon the adjoining land of another, to his loss. *Gannon* v. *Hargadon*, 106.
2. If the owner of two adjoining estates, through one of which a drain exists for the benefit of the other, conveys them both on the same day to different purchasers, the right to use the drain will not pass as an easement or appurtenance to the purchaser of the upper estate, provided a new drain can be built upon his own land by reasonable labor and expense. *Randall* v. *McLaughlin*, 366.
3. A grant of land with a right to lay a pipe across other land of the grantor lying south of the conveyed premises, sufficient to draw one third of the water from an existing aqueduct to the conveyed premises, does not authorize the grantee or his assigns to take water from the aqueduct at a point above the grantor's land, even with the consent of the owner of the land above. *Curtis* v. *Noonan*, 406.
4. If the owner of land to which water is brought through an aqueduct conveys a portion of the same, with a right to take water to the conveyed premises by a pipe from the aqueduct on his land, and thereafter orally consents that his grantee may take the water to which he is entitled from the aqueduct at a point above the grantor's land, he cannot withdraw such consent after it has been acted upon; and he will be liable in damages for cutting off a pipe laid by the grantee in pursuance of such consent. *Ib.*

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5. An easement in the land of an insane person cannot be acquired by prescription, under the statutes of this commonwealth, until the expiration of such time after his death or the removal of his disability as would bar an action by him or his legal representatives for the land, no matter how long such disability may continue. *Edson* v. *Munsell*, 557.

6. Upon the issue whether an owner of land was insane at the commencement and during the continuance of the time in which an easement therein by prescription is alleged to have been established, the books of assessors of taxes are competent evidence to show that the land was taxed to his guardian; and a bond, found on file in the probate office, and appearing to be an official bond of his guardian, though not bearing a certificate of the approval of the judge, may also be introduced, coupled with proof that, at the date of it, and for many years afterwards, no record of the appointment of guardians could be found in any book, and that the only evidence of the appointment of guardians at that time was their bonds upon the files, and also coupled with proof by the records that such guardian was subsequently removed, and another person appointed in his place. *Ib.*

See WATERCOURSE, 1.

EQUITY.

1. An objection to a supplemental bill in equity on the ground that it seeks to maintain the suit upon facts which have occurred since the filing of the original bill is waived by omitting to demur to it upon that ground, and consenting to go into a full hearing before a master upon the merits of the case as set forth in the original and supplemental bill. *Pinch* v. *Anthony*, 470.

2. The objection that all of the stockholders in a corporation are not made defendants in a bill in equity under *St.* 1862, *c.* 218, for the recovery of sums due from the corporation cannot be taken by demurrer, even though the bill shows that not all of the stockholders are joined; but the objection must, under § 9, be taken by plea or answer. *Essex Co.* v. *Lawrence Machine Shop*, 352.

3. A bill in equity may be maintained to redeem shares in the capital stock of a corporation which have been transferred by an instrument absolute in its terms, upon parol proof that in reality the transfer was made only as collateral security for a debt. *Newton* v. *Fay*, 505.

See CONTRACT, 3; INSOLVENT DEBTORS, 1; MORTGAGE, 8, 10, 15.

ERROR.

1. If a judgment is erroneous by reason of a defective service of the writ upon the defendant, and also because the defendant was an infant who had no guardian, and no guardian *ad litem* was appointed, he upon coming of full age may execute a written release of errors, which will have the effect to confirm the judgment. *Hill* v. *Keyes*, 258.

2. In an action against an officer to recover for his failure to apply on an execution the property which was attached on the writ, he cannot set up that the

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judgment was erroneous, if the judgment debtor has released the errors therein. *Ib.*

ESTOPPEL.

If a debtor who lives in this commonwealth, being about to go away, represents to a creditor that he does not intend to return, but without any purpose of deceiving the creditor and inducing the belief that he intends to take up a permanent residence in another state, when in fact he has no such purpose, and he subsequently returns and is sued after the lapse of six years, he is not estopped by the above representation from setting up in defence the statute of limitations, and showing in support of this defence that he never acquired a domicil elsewhere. *Langdon* v. *Doud*, 433.

See MARRIED WOMAN, 7.

EVIDENCE.

1. A formal bill of sale, absolute in its terms and under seal, conveying personal property with covenants of warranty, cannot, in an action at law between the parties to it, be shown by parol evidence to have been intended only as collateral security. *Harper* v. *Ross*, 332.
2. Evidence to prove that a person was a skilful carpenter and joiner ten years ago in Massachusetts, or to show the relative value of the labor of a good architect and an ordinary joiner, is incompetent for the purpose of proving the value of that person's recent labor in erecting a building in Illinois. *Shepard* v. *Ashley*, 542.
3. An attachment of real estate may be proved by the entry thereof in the clerk's book of attachments, kept under Gen. Sts. *c.* 123, § 53. *Metcalf* v. *Munson*, 491.
4. The entry of a baptism, contemporaneously made by a Roman Catholic priest, in the discharge of his ecclesiastical duty, in his church record of baptisms, is competent evidence, after his death, of the date of the baptism, if the book is produced from the proper custody; although he was not a sworn officer, and the record was not required by law to be kept. *Kennedy* v. *Doyle*, 161.
5. A bill of parcels of goods, acknowledging the receipt of payment by note, is not conclusive evidence of the contract; but parol evidence is competent to show that the sale was conditional, and that the title was to remain in the vendor until a note signed by responsible persons should be furnished to him. *Hildreth* v. *O'Brien*, 104.
6. In an action to recover for the conversion of personal property, the admissions of the plaintiff as to the bargain under which he claimed to hold it are not to be excluded, when nothing further is shown but the existence of a written bill of parcels, or schedule enumerating the articles purchased, and it does not appear that such bill of parcels was signed by the vendor. *Olmstead* v *Mansir*, 424.

In an action against an administrator to recover for money had and received by his intestate, evidence is competent of the declarations of the intestate and

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of the defendant respecting the same; but evidence is not competent of the declarations of the plaintiff to the defendant, of matters which the defendant did not admit, but concerning which he declared his ignorance. *Heywood* v *Heywood*, 105.

8. Evidence that an original charge on books of account was made to one person is not conclusive evidence that the contract was made with him or on his credit. *Banfield* v. *Whipple*, 27.

9. In an action to recover damages for an injury to a hired horse, by immoderate driving, evidence is competent to prove that the defendant, immediately after the injury charged, made an assignment of all his property. *Ib.*

10. If an interpreter is employed as an agent to communicate an offer, which is accepted, the offer as communicated by him is admissible in evidence against his principal, for the purpose of proving the contract, without proof that he truly interpreted the offer which he was authorized by his principal to communicate. *Camerlin* v. *Palmer Co.* 539.

11. If, in an oral agreement made through the medium of an interpreter, the language used is in dispute and is confused, it is proper to leave it to the jury to determine upon all the evidence what the contract was. *Ib.*

12. If the indorsement was made upon the settlement of an action of slander brought by the defendant against the plaintiff, for charging the defendant with keeping a gambling-house and a house of ill fame, and the settlement was effected while the plaintiff was drunk, by means of threats to arrest him on the writ, the plaintiff, for the purpose of showing his mental condition at the time, may prove that he had been drunk for a great part of the time for several weeks, at the defendant's house and with his knowledge. So also he may prove that the defendant in fact kept a gambling-house and a house of ill fame. *Foss* v. *Hildreth*, 76.

13. In an action to recover a certain sum as the price agreed to be paid for land, if the amount is in controversy, the defendants may prove that the plaintiff had previously conveyed away the right to cut the wood off from the same, and that therefore the value of the land conveyed was less than the sum claimed by the plaintiff as the price agreed to be paid. *Parker* v. *Coburn*, 82.

14. One who has long had the care of an insane person and provided for his table and has been on several occasions and for a considerable period of time in another family while he was afterwards boarding there, may testify to an opinion as to the value of boarding and taking care of him in the latter place. *Kendall* v. *May*, 59.

15. If the defendant in an action upon a promissory note has possession of the same and refuses to produce it, a witness who is acquainted with the defendant's handwriting may testify that he has seen the note and that the body and signature were in his opinion in the defendant's handwriting. *Prescott* v. *Ward*, 203.

16. If an administrator, in an action against him on a promissory note given by his intestate to a woman, defends on the ground that she was his intestate's mistress, and that the note was given for an illegal consideration, and he, being

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a witness, testifies on cross-examination that he and his family had received her as a visitor, and that she had been intimate with them, he cannot be allowed to testify further that after her last visit to them he gave notice to his intestate not to bring her there again. Nor can the plaintiff be allowed to introduce in evidence letters written to her, in the absence of the intestate, by a member of his family, for the purpose of showing the character of the intercourse between them. *Ib.*

See ASSUMPSIT, 4; CONTRACT, 8; CORPORATION, 2; COUNTERFEIT BILL: EASEMENT, 6; INSOLVENT DEBTORS, 2, 4; INSURANCE, 3; JUDGMENT, 1, 3; MILK, 2; POLYGAMY; PRINCIPAL AND AGENT; SCHOOL, 1; TRESPASS; WAY, 4.

## EXECUTION.

1. An officer's statement in his return of a levy of an execution upon real estate is not conclusive evidence of the existence or amount of an incumbrance thereon. *Hannum* v. *Tourtellott*, 494.
2. If a levy of an execution is made upon several parcels of land, some of which are subject to a mortgage and others not, they may all be appraised together, under Gen. Sts. *c.* 103, §§ 6, 33, and the amount due upon the mortgage deducted from the appraisement so made, provided that such amount is not greater than the value of the parcels which are mortgaged. *Ib.*

## EXECUTORS AND ADMINISTRATORS.

1. An executor or administrator may be removed, under Gen. Sts. *c.* 101, § 2, if he is evidently unsuitable for the discharge of his trust at the time when the petition for his removal is heard, although the same facts which render him unsuitable existed at the time of his appointment. *Drake* v. *Green*, 124.
2. An executor or administrator will not be removed, as evidently unsuitable for the discharge of his trust, simply on proof that he was unsuitable at the time of his appointment, and without proof that he continues to be so. *Ib.*
3. One who has been an executor of an estate and resigned his trust cannot maintain a suit either at law or in equity against the administrator with the will annexed, to recover a debt due to him from the estate, but his remedy is in the settlement of the accounts of administration in the probate court. *Prentice* v. *Dehon*, 353.
4. If a person has promised to pay a certain sum of money at his death, with a gross sum for interest thereon, a legacy by him to his creditor, equal in amount to the principal sum, is not to be applied in payment thereof, unless the will shows that such was the intent of the testator, and is therefore inadmissible in evidence, in an action against his executor upon the promise. *Parker* v. *Coburn*, 82.
5. If an executor who is authorized to sell real estate of his testator at private sale sells the same to his relatives for less than he might have obtained from others, for the purpose of favoring them to the injury of the legatees, the sale will be void; and on the trial of an issue to ascertain whether such sale was

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fraudulently made by him it is not necessary to instruct the jury that it must be proved that he in making the sale was guilty of gross neglect and mismanagement. *Oberlin College* v. *Fowler*, 545.

See CONTRACT, 1; EVIDENCE, 7; JUDGMENT, 2; MARRIED WOMAN, 3, PROMISSORY NOTES, 5.

FLOWING LAND.

Under Gen. Sts. *c.* 114, §§ 3, 7, 8, and *c.* 149, § 4, the superior court has exclusive jurisdiction of complaints for flowing land, and such a complaint cannot be removed to this court by the defendant on affidavit. *Humphrey* v. *Berkshire Woollen Co.* 420.

FOREIGN COINS.

If a contract is made to give obligations for a certain sum of money, which at the election of the party who is to receive it may be expressed in the currency of Great Britain, and no standard is agreed upon by the parties at which the pound sterling shall be reckoned, it should be reckoned at $4.84. *Commonwealth* v. *Haupt*, 38.

FRAUDS, STATUTE OF.

1. If the time for the performance of a written contract, which is within the statute of frauds, has been extended by parol, an action can only be maintained upon the written contract; and it is no defence to such action to prove that the time for the performance has been extended by parol, if the defendant has not performed or offered to perform it within the time as extended; and the damages in such case are to be fixed with reference to the time when the written contract was broken. *Whittier* v. *Dana*, 326.

2. A memorandum in writing agreeing to give a certain sum "for the whole property, from cellar to top, including lease, press, boiler and engine, type, fixtures, furniture," &c., and to pay a certain sum quarterly until the principal and interest are paid, and, "in addition, pay over the twelve hundred and fifteen dollars to be received from A. and the proceeds and good will of the 'Times,' all of which sums shall be deducted from" the gross sum to be paid, is not sufficient to take the contract out of the statute of frauds; nor can an action upon it be supported, by the addition of oral proof that the memorandum was intended to apply to an unexpired lease of a certain building, subject to a certain ground rent, in which building the press and other articles were situated and the "Times" newspaper was printed, and that A. had agreed and bargained with the vendor for a release and conveyance of a small portion of the land included in said lease for twelve hundred and fifteen dollars, and that there was no other building anywhere owned or held by the vendor under a lease to which the description would apply. *Farwell* v. *Mather*, 322.

FRAUDULENT CONVEYANCE.

An attachment in another state upon a writ against a debtor who is in insolvency in this commonwealth, of property which belonged to him before his insolvency

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will render the attaching creditor liable, as for a conversion, to the purchaser of the property who was in possession of it under a claim of title at the time of the attachment, although the sale to such purchaser was in fraud of creditors. *Pomroy* v. *Lyman*, 468.

See INSOLVENT DEBTORS, 1, 7.

GUARDIAN AND WARD.

1. A claim against a spendthrift under guardianship may be enforced by a trustee process, and the creditor is not confined to a suit upon the guardian's bond. *Hicks* v. *Chapman*, 463.
2. If real estate of a spendthrift is orally leased by his guardian, with nothing in the terms of the contract to show specially that it was the personal contract of the guardian, the rent due may be attached for the ward's debts by a trustee process. *Ib.*

HOMESTEAD.

1. If the purchaser of a homestead, on the day of receiving his deed, borrows money which he applies in part payment therefor, and shortly afterwards, on the same day, executes a note for the money so borrowed, the note is to be regarded as relating back to the time of the actual loan, and as an existing debt at the time of the purchase of the homestead. *Stevens* v. *Stevens*, 146.
2. A woman who has never been married and has no children cannot hold an estate of homestead under *St.* 1855, *c.* 238. *Woodworth* v. *Comstock*, 425.

HUSBAND AND WIFE.

See ANTE-NUPTIAL CONTRACT; INSOLVENT DEBTORS, 5; MARRIED WOMAN.

IMPOUNDING.

If beasts doing damage are distrained, and driven to the distrainer's yard till the pound-keeper can be called, and then delivered to the latter in the highway, it is the duty of the distrainer to state his demand, and to give notices, as required in Gen. Sts. *c.* 25, §§ 27, 29, 30; and if he omits to do so, he will be liable as a trespasser *ab initio*. *Merrick* v. *Work*, 544.

INDICTMENT.

1. Under *St.* 1864, *c.* 250, §§ 2, 3, the decision of a judge of the superior court overruling a motion, made before the jury are sworn, to quash an indictment, is subject to exception. *Commonwealth* v. *McGovern*, 193.
2. An indictment, under *St.* 1863, *c.* 252, against a person for enticing and soliciting another to leave this commonwealth, for the purpose of enlisting in the military service of the United States elsewhere, need not allege that the person enticed did leave, or was a citizen of, or liable to do military duty in, this commonwealth, or set forth the particular means used to entice or solicit such person. *Ib.*

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3. The *St.* of 1868, c. 252, is not repealed by U. S. St. of 1865, *c.* 79. *Ib.*
4. An indictment to recover a penalty imposed by statute need not negative the existence of circumstances which, under a proviso contained in the statute, would exonerate the defendant from liability. *Commonwealth* v. *Fitchburg Railroad Co.* 189.
5. If unauthorized sales of intoxicating liquor are proved to have been made by a child under the age of fourteen years, in the presence of its mother and in obedience to her directions, it is necessary, in support of an indictment against the child for making such sales, to establish, as a distinct fact, its legal capacity to commit a crime. *Commonwealth* v. *Mead*, 398.

See COMPLAINT; MILK; SPIRITUOUS AND INTOXICATING LIQUORS, 4; WARRANT.

## INFANT.

A promise by a minor to pay money borrowed on joint account with another person may be ratified by the minor after coming of age, like other voidable promises. *Kennedy* v. *Doyle*, 161.

See INDICTMENT, 5.

## INSANE PERSONS.

If the guardian of an insane person has been removed and no new guardian appointed, one who at his request takes such insane person on a journey for pleasure out of the Commonwealth may recover of him the expenses thereof, provided that the jury find that they were reasonable and proper under the circumstances. *Kendall* v. *May*, 59.

See EASEMENT, 5, 6; EVIDENCE, 14.

## INSOLVENT DEBTORS.

1. If land has been conveyed by an insolvent debtor in fraud of creditors to one who has thereafter mortgaged it to a third person by a mortgage which is also void, the assignee of the insolvent debtor may maintain a bill in equity to set aside the conveyances. If, however, the mortgage has been assigned to an innocent purchaser for a valuable consideration, it cannot be declared void, but the parties to the fraud will be held responsible for the amount thereof. *Hubbell* v. *Currier*, 333.
2. For the purpose of proving a person's insolvency at a particular time, evidence is competent to show that a note signed by him was then outstanding, although its validity was denied by him, and it was afterwards disallowed in the court of insolvency. *Metcalf* v. *Munson*, 491.
3. Evidence that an insolvent debtor was reputed to be a man of large property at the time when a conveyance by him was made is admissible upon the issue whether the grantee had reasonable cause to believe him insolvent. *Ib.*
4. The Gen. Sts. *c.* 118, § 91, providing that if a conveyance of property by an insolvent debtor is not made in the usual and ordinary course of his business

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that fact shall be *prima facie* evidence that the grantee had reasonable cause to believe him insolvent, apply to conveyances made to preëxisting creditors as well as to other conveyances. *Ib.*

5. Assignees of an insolvent debtor may maintain a real action against his wife, without averring that she held the land to her sole and separate use. *Blake* v. *Sawin*, 340.
6. A debtor who has concealed his property in order to defraud his creditors is to be regarded as insolvent, although he may have sufficient property in money to pay all his debts. *Ib.*
7. A voluntary conveyance made by an insolvent debtor for the purpose of defrauding his creditors may be avoided by his assignees, although the grantee did not participate in the fraudulent intent. *Ib.*
8. An attachment of property is not dissolved by proceedings in insolvency against the debtor, which are suspended before an assignment is executed. *Hill* v. *Keyes*, 288.

See FRAUDULENT CONVEYANCE; MORTGAGE, 9; PLEADING, 5.

## INSURANCE.

1. If a partial loss occurs upon a policy, for a sum expressed in dollars, made here, upon property situated in a foreign country, the rule for estimating damages is to determine the loss at the place where it occurred, in the currency of that country, and then to find the equivalent in the country where suit is brought, by determining the actual intrinsic value of the currency of that country, as compared with the currency of the other; and it is immaterial, in reference to this, that the policy contains a provision that in case of loss the company shall have the right to replace the articles lost or damaged with others of the same kind and equal goodness. *Burgess* v. *Alliance Ins. Co.* 221.
2. An open policy of insurance upon merchandise will not cover articles kept wholly or partially for use in and about a building, but only articles kept for sale; but an open policy upon "property" contained in specified buildings will cover articles kept for use as well as those kept for sale. *Ib.*
3. A policy of insurance on a vessel from New York to ports in South America and thence to ports of discharge in the United States, with an indorsement thereon of "liberty to deviate by going to port or ports in Europe, by paying an equitable premium therefor," covers one round voyage, but does not include a distinct and independent voyage, having no connection with the general objects and purposes of the voyage insured; and in an action upon such a policy evidence is inadmissible to show a usage among commercial men and underwriters which permitted the making of intermediate voyages between the ports of Europe, under the protection of such deviation clause; or a usage, upon which policies have been issued and paid, and which gave to the language of such deviation clause a peculiar and technical sense, namely, the signification of the liberty to make such intermediate voyages; or a usage of trade and commerce by which American vessels at Constantinople, seeking return cargo from Smyrna or other Mediterranean port, in the interval between the

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discharge of the outward cargo and the season for obtaining cargo therefrom, make intermediate voyages; or to control the legal meaning of such deviation clause by proof of conversation, at the time it was written, between the underwriters and the assured. *Seccomb* v. *Provincial Ins. Co.* 305.

4. If a policy of insurance is not payable till ninety days after due notice and proof of loss, in conformity to the conditions thereto annexed, and the notice and proof of loss which are furnished to the insurers, in compliance with a requirement in the conditions that such notice should show in what manner the building was occupied, state that it was occupied as a hotel, and it appears in proof that no license had been given to keep it as a hotel, and a memorandum of special hazards annexed to the policy prohibits all unlawful business, no action can be maintained upon the policy. So if such notice contains a statement that the building was lighted with burning fluid, and the memorandum of special hazards provides that the policy shall be void if burning fluid is used without permission in writing indorsed on the policy, no action can be maintained. *Campbell* v. *Charter Oak Fire and Marine Ins. Co.* 213.

5. If an incorrect statement of a material matter has been made through mistake in a notice and proof of loss which were furnished to insurers, in compliance with a requirement in the conditions of insurance annexed to a policy, and no amended statement has been furnished to the insurers before the trial of an action upon the policy, the insured cannot be allowed to prove the mistake, and show that the facts were not as therein stated. *Ib.*

6. An omission to disclose, in an application for insurance on a building, a written agreement by the applicant to convey it in consideration of a certain sum of money to be paid within a fixed time, or to disclose the fact that the greater part of the money orally agreed upon as the consideration for the conveyance was paid before the written agreement was entered into, will not avoid or prevent the recovery of the full amount insured by a policy of insurance which provides that it is issued on condition that the application contains a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property. *Davis* v. *Quincy Mut. Fire Ins. Co.* 113.

7. A policy of insurance upon the interest of a "mortgagee in possession," in a building "occupied by a tenant," is valid, although another person was in the occupation of the premises under an agreement from the assured to convey the same to him. *Ib.*

8. A mortgagee of a building whose interest therein is insured by a policy which provides that, in case of payment of any loss to him, he shall assign to the company so much of his interest in the mortgage as may not be necessary to extinguish the residue of the debt due thereon, may recover the full amount insured, although before the date of the policy he had entered into a written agreement to convey the premises insured to a person who, by the terms of the same agreement, was to be at the expense and to have the benefit of the insurance, and who, after the date of the policy and before the loss, had recognized the policy by paying the expense thereof. *Ib.*

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9. If a policy of insurance upon a trip-hammer shop with the machinery therein contains a provision that the policy shall be void if the building remains unoccupied over thirty days without notice, it is not erroneous to instruct the jury that "it is not sufficient to constitute occupancy that the tools remained in the shop and that the plaintiff's son went through the shop almost every day to look around and see if things were right, but some practical use must have been made of the building; and if it thus remained without any practical use for the space of thirty days, it was, within the meaning of the policy, an unoccupied building for that time, and the policy became void." *Keith* v. *Quincy Mut. Fire Ins. Co.* 228.

10. A foreign mutual insurance company which has issued a policy to a citizen of this commonwealth, and laid an assessment thereon, without first appointing a general agent here under Gen. Sts. *c.* 58, § 68, may, upon subsequently appointing such agent, maintain an action in this commonwealth to recover the assessment. *National Mut. Fire Ins. Co.* v. *Pursell*, 231.

11. If the by-laws of a mutual insurance company do not provide that the deposit notes shall be deemed to be absolute funds of the company, but speak of assessments thereon, such assessments may be laid and collected in the usual manner. *Citizens' Mut. Fire Ins. Co.* v. *Sortwell*, 110.

12. If a committee of the directors of a mutual insurance company have made a report recommending an assessment upon the deposit notes, and stating the amount and all the details, a vote of the directors to accept and adopt the report is sufficient to authorize the laying of the assessment. *Ib.*

13. Under the Gen. Sts. *c.* 58, § 54, the statement of the condition of a mutual insurance company at the time of laying an assessment may be recorded in the same book in which the annual statements of the company are recorded; and if signed by several of the directors, and it does not appear that any others voted for it, the presumption is that all who voted for it signed it. *Ib.*

14. If a mutual insurance company have issued policies running for one year, three years and five years, respectively, the premiums for three years being twice the rate charged for one year, and those for five years being three times the rate charged for one year, and, in computing the amount to be assessed for each month's losses, a basis is found by taking the whole of the premium for each one year policy, one third of that for each three years policy, and one fifth of that for each five years policy, and this method is found by the superior court, in an action to recover an assessment, to be just and equitable, this court will not, upon a hearing on exceptions, declare the assessment void, as being unequal. *Ib.*

See MORTGAGE, 4, 10.

## JUDGMENT.

1. A judgment of a court of general jurisdiction of another state may be proved by duly certified copies of all the papers in the case, with a like certified copy of a record entitled "judgment roll on failure to answer," which simply contains the names of the court, county and parties, with an affidavit of the



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plaintiff's counsel that no answer or demurrer has been served upon him, and, after reciting the service of the summons and copy of the complaint on one of the defendants, the failure to serve a demurrer or answer, and the assessment of damages by the clerk, sets forth that it was adjudged that the plaintiffs recover the said sum of the defendants with costs, and that execution issue against the sole property of the defendant upon whom service was made, and the joint property of both defendants; but such judgment, being rendered on default and without a service upon all the defendants, will not support an action in this commonwealth even against the defendant who was served with process, without proof that by the laws of that state such judgment might properly be rendered there. *Knapp* v. *Abell*, 485.

2. A judgment in favor of the indorsee against the maker of a negotiable promissory note, payable on demand, is conclusive evidence that the maker was indebted upon the same, to the amount of the judgment; and he cannot thereafter, in his capacity of administrator of the estate of the payee, maintain an action against the indorsee to recover the value thereof, on the ground that he was a creditor of the payee, and that the transfer by the payee to the indorsee was fraudulent and void as against him, if there were no other creditors of the payee. *Flint* v. *Bodge*, 128.

3. If the demandant in a real action has failed, and judgment has been rendered against him, for the sole reason that his grantor was disseised at the time of delivering the deed to him, and he has subsequently fortified his title in this respect, he may, in a new action against the same party to recover the same premises, prove by parol evidence that the former judgment was rendered solely upon that ground, although there was another ground of defence, concerning which evidence was offered on both sides. *Perkins* v. *Parker*, 22.

See SCIRE FACIAS, 2.

## LANDLORD AND TENANT.

1. A tenancy at will is determined by the execution of a written lease for a year by the owner of the premises to another tenant, although such lease contains a provision that no rent shall be claimed till the lessee is in actual possession. *Pratt* v. *Farrar*, 519.

2. Nearly forty-eight hours is sufficient time to allow for a tenant at sufferance to remove from the lower story of a house; and after the expiration thereof a process under Gen. Sts. *c.* 137, may be commenced to remove him. *Ib.*

3. If an estate which is occupied by a tenant at will is sold by the owner, and the tenant remains in possession thereof after notice of the sale, he is liable in an action of contract for rent to the purchaser, under Gen. Sts. *c.* 90, §§ 25, 26. *Bunton* v. *Richardson*, 260.

## LEASE.

A lease for years was executed in duplicate, of a brick stable and a wooden carriage-house. One copy provided that the lessor should make all necessary

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repairs on the outside of the "building," and the other upon the outside of the "buildings." The lessee covenanted to deliver up the premises at the end of the term in good order and condition, reasonable use and wearing thereof, fire and other unavoidable casualties excepted, and not to make or suffer any waste thereof, and to make all necessary repairs on the inside of the building. During the term, the carriage-house fell from the weight of snow upon the roof, and injured the lessee's carriages kept therein; and the lessor refused to rebuild it. *Held*, that the lessee might maintain an action for the refusal to rebuild, so as to make the carriage-house outwardly complete, but not for the injury to the carriages. *Leavitt* v. *Fletcher*, 119.

LIEN.

The lien of a boarding-house keeper, under Gen. Sts. *c.* 151, § 29, upon property of a boarder brought by him to the boarding-house is not terminated by a sale of the property in good faith to a third person, without the knowledge of the boarding-house keeper, and is valid and effectual for board furnished after the sale, under the original contract for board, until notice of the sale is given or the property is removed. *Bayley* v. *Merrill*, 360.

LIMITATIONS.

A written promise to pay a debt which is barred by the statute of limitations "as soon as I can" will not sustain an action thereon without proof of the ability of the promisor. *Bidwell* v. *Rogers*, 438.

See BASTARD, 1; ESTOPPEL.

LORD'S DAY.

1. In an action to recover damages for an injury sustained by reason of a defective way, the defendants may prove that the plaintiff, at the time of receiving the injury, was travelling in violation of the statutes for the observance of the Lord's day, without specially averring that as a ground of defence in the answer. *Jones* v. *Inhabitants of Andover*, 18.
2. A person cannot legally travel on the Lord's day for the purpose of supplying fresh meat to marketmen, whom his master has agreed to supply therewith, although he could not do this, in addition to his other work, on Monday morning, and his master, by reason of illness, is unable to do it himself. *Ib.*

MARRIAGE AND DIVORCE.

A woman from whom a divorce has been granted on the ground of adultery may in the discretion of this court, under *St.* 1864, *c.* 216, have leave to marry again, simply upon proof that since the divorce she has maintained a good character and is a fit person to marry. *Cochrane, petitioner*, 276.

See POLYGAMY.

MARRIED WOMAN.

1 An abandonment of a married woman by her husband gives her the authority

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to put out her minor children to proper service and to assign their wages, for the purpose of aiding in the support of the family. *Camerlin* v. *Palmer Co* 539.

2. Under *St.* 1845, *c.* 208, a married woman to whom real estate had been conveyed, without words expressing that it was to be held by her to her sole and separate use, could not make a valid conveyance thereof without her husband's joining as a grantor; and a deed not so executed cannot be reformed in equity *Jewett* v. *Davis*, 68.

3. If a married woman delivers her own money to another person to deposit in a savings bank in his own name in trust for her, and this is accordingly done, the trust thereby created is terminated by his death, and she thereupon becomes entitled to the money; and if the administrator of his estate obtains it, he is personally liable to her in an action for money had and received. *Farrelly* v. *Ladd*, 127.

4. If a married woman purchases personal property with her own means or upon her own credit exclusively, and takes the conveyance to herself, for her own use, the property becomes her separate property, and is not liable for her husband's debts; although in making the conveyance there is no express statement, in writing or otherwise, that it is to be held as her separate property. *Spaulding* v. *Day*, 96.

5. If a woman mortgages her land to secure a debt of a third person, her subsequent marriage to the mortgagee will not extinguish the mortgage; but after his death his legal representatives may enforce it. Nor will the appointment of the mortgagee as administrator of the estate of the third person have this effect, if no funds come into his hands which can be applied to the payment of the mortgage debt. *Bemis* v. *Call*, 512.

6. In such case, the fact that during the marriage her husband undertook to foreclose the mortgage, and that he executed a will treating the mortgaged premises as his own, cannot legally prejudice her rights after his death. *Ib.*

7. A married woman cannot during coverture be barred of her estate, held without any limitation to her sole and separate use, by an *estoppel in pais*. *Ib.*

See WILL, 5.

MASTER AND SERVANT.

See RAILROAD, 8.

MILK.

1. An indictment which alleges that the defendant "did unlawfully keep, offer for sale and sell" adulterated milk charges but one offence. *Commonwealth* v. *Nichols*, 199.

2. In support of such indictment, one who in a great many instances has used a lactometer, for the purpose of testing the quality and purity of milk, may testify to the result of an experiment made by him with the same lactometer upon the milk in question, although no evidence is offered as to the character of the instrument. *Ib.*

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## MILLS.

See WATERCOURSE, 1.

## MONEY HAD AND RECEIVED.

See ASSUMPSIT, 1, 2.

## MORTGAGE.

1. A mortgage of land to an individual, "his successors and assigns forever," conveys only a life estate, although it contains a power of sale, which has never been executed, authorizing the mortgagee, in case of default in the performance of the condition, to sell the land and execute a conveyance thereof in fee simple. *Sedgwick* v. *Laflin*, 430.

2. A power of sale in a mortgage of land, which authorizes the mortgagee to advertise and sell at auction the mortgaged premises, including all equity of redemption in the mortgagor, does not authorize a sale of the equity of redemption separately; and if the notice of sale states only that the mortgagor's equity of redemption will be sold, it is insufficient, and a sale of the premises under such a notice is invalid and passes no title to a purchaser which will bar the right of redemption. *Fowle* v. *Merrill*, 350.

3. A mortgagee of land, upon making a sale thereof under a power of sale, in the ordinary form, contained in the mortgage, may give credit for the purchase money, though in case the sum for which the land is sold is more than the sum secured by the mortgage he is liable to pay the surplus to the owner of the equity of redemption in money. *Bailey* v. *Ætna Ins. Co.* 286.

4. If the purchaser at such sale executes to the mortgagee a note and a new mortgage of the land in part payment of the purchase money, and the person who formerly owned the right to redeem the first mortgage becomes the owner of the right to redeem the second mortgage, and thereafter takes out a policy of insurance payable to the mortgagee in case of loss, without any words to indicate which mortgage title he thereby intended to recognize, the title of the mortgagee under the second mortgage will, in the absence of evidence to the contrary, be taken to be the one that is referred to. *Ib.*

5. If a mortgage is executed to certain persons described as trustees of an association, which is not a corporation, the legal title under the mortgage vests in those persons, and an assignment of the mortgage by the association, or by only one of the mortgagees, is invalid, and will not enable the person named as assignee to foreclose the mortgage. *Austin* v. *Shaw*, 552.

6. If the assignee under an invalid assignment of a mortgage has attempted to foreclose the same, the entry and possession of the administrators of his estate after his death, claiming under his title, will not operate as a disseisin of the mortgagor. *Ib.*

7. If a building which stands upon mortgaged land is partly destroyed by fire, the mortgagor has no right, without the mortgagee's consent, to sell such parts of the building as are saved; and if the same have been sold by a third person to whom he has delivered the same for that purpose, he cannot maintain an

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action against such third person to recover the sum received as the price thereof, if meanwhile the mortgagee has entered upon the premises for breach of condition, and has forbidden the payment to the mortgagor, and the value of the land is less than the amount of the debt secured by the mortgage. *Wilmarth* v. *Bancroft*, 348.

8. If after the breach of the condition of a mortgage of land further advancements are made by the mortgagee to the mortgagor, under an oral agreement that the mortgage shall stand as security for them, a court of equity will not aid the mortgagor, or one who has no higher equity than the mortgagor, to redeem without allowing for such advancements. *Stone* v. *Lane*, 74.

9. If the assignees in insolvency of a mortgagor, by his request, and without objection from his creditors, convey to his wife an equity of redemption, without consideration and with notice, she, in seeking to redeem, will be subject to the same equities as he would have been. *Ib.*

10. If the owner of the equity of redemption of land, in pursuance of a provision in the mortgage, procures a policy of insurance upon the buildings standing thereon, at his own expense, payable to the mortgagee in case of loss, and the policy contains a written provision that no sale of the property shall affect the right of the mortgagee to recover in case of loss under the policy, and the equity of redemption is afterwards sold, and a loss occurs, and the insurance company upon paying the amount thereof to the mortgagee take from him an assignment of the mortgage and policy, the purchaser of the equity of redemption is entitled to the benefit of the money so paid by the insurance company, and may redeem the land upon paying to the insurance company the balance due upon the mortgage debt after deducting that amount. *Graves* v. *Hampden Fire Ins. Co.* 281.

11. If a mortgage of an undivided half of a lot of land is assigned, "for the purpose of protecting any one to whom" the assignee "has made conveyance of any lands conveyed by said mortgage, from all claims of dower," the assignee may foreclose the mortgage, and when he has done so may have partition of the land, against the owner of the other half, irrespective of any question as to the duty of the assignee, under the above provision of the assignment. *Phelps* v. *Townsley*, 554.

12. Under Gen. Sts. *c.* 140, § 5, after a conditional judgment has been entered in an action to foreclose a mortgage, the court may submit to a jury a disputed question of fact as to the amount due on the mortgage. *Foss* v. *Hildreth*, 76.

13. If in such case the mortgage note bears an indorsement of $900, and the question in dispute is, whether that sum ought to be deducted or not, the submission to the jury of the following issues is unobjectionable: "Was the sum of $900 paid and received on said note? Was anything received or accepted on said note in satisfaction of the sum of $900?" *Ib.*

14. One who has executed to different persons two mortgages upon the same land, with covenants of warranty, cannot, after the titles under the two mortgages have both become united in one person, and the second mortgage has been foreclosed, be allowed to open the foreclosure by paying the sum secured by the first mortgage. *Butler* v. *Seward*, 466.

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15 If the owner of the equity of redemption of mortgaged real estate pays the amount secured by the mortgage to the mortgagee, and fraudulently induces the latter to assign the mortgage to a third person instead of discharging it, neither the mortgagee nor one to whom he had agreed to assign the mortgage can maintain a bill in equity to set aside the assignment. *Jewett* v. *Davis*, 68.

16. A mortgage of personal property made to secure an indorser of a note is not discharged by the indorser's lending to the mortgagor money which is applied to the payment of the note, unless the parties intend that the mortgage shall be thereby discharged. *Bryant* v. *Pollard*, 81.

17. No action lies to recover the price of mortgaged personal property sold in violation of Gen. Sts. *c.* 161, § 62, and returned by the purchaser to the seller. *Ib.*

18. A rifle having a skeleton stock, at the time when a mortgage thereof was executed, is not so substantially changed by having a new wooden stock and a new and different kind of lock substituted for the original ones, by way of repairs, as to authorize an attaching creditor of the mortgagor to hold the same against the mortgagee, provided is is capable of being identified by parol evidence. *Comins* v. *Newton*, 518.

See ASSUMPSIT, 4; AUDITOR; BOND; INSOLVENT DEBTORS, 1; MARRIED WOMAN, 5; RAILROAD, 1–4; USURY, 2.

## NEGLIGENCE.

1. If there are two entrances to a store, and there is a trap-door between one of them and the stairs leading to the upper stories, which are verbally leased to a tenant with permission to use such entrance, the owners, who occupy the lower stories, are bound to use the trap-door with reference to the safety of those who have a right to pass there; and if they neglect to exercise suitable and reasonable precautions to guard against accident while the trap-door is open, they may be held liable in damages to a person having lawful occasion to pass to the upper rooms, who, while in the use of due care, falls through the trap-door and sustains injury by reason of their negligence. *Elliott* v. *Pray*, 378.

2. If the owners of a store, which is situated upon a public street, have let the upper stories thereof to a tenant, and an entrance, directly in front of the stairs which lead to the upper stories, is so constructed and is so habitually kept open as to indicate that it is a proper entrance for those who have occasion to ascend the stairs, and there is a trap-door between it and the stairs, which is carelessly left open by them, they may be held liable in damages to one who, while in the use of due care, and having lawful occasion to ascend the stairs, is thereby induced to pass through that entrance, and falls through the trap-door and sustains injury by reason of their negligence. *Ib.*

3. One who is injured by falling through a trap-door in a portion of a factory which is not open to the public, but is intended exclusively for workmen, and where the owner had held out no invitation or allurement, express or implied,

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for him to enter, cannot recover damages therefor against the owner of the factory. *Zoebisch* v. *Tarbell*, 385.

4. If, in an action to recover damages for an injury sustained from a collision with a wagon left standing in a highway by the defendant, the evidence shows that the plaintiff had seen the obstruction there on the day of the accident, that he was accustomed to drive horses, and that the accident happened while he was driving a gentle horse in a dark evening on a slow trot, looking out on one side of the horse for a blanket which he had shortly before lost from his wagon, and his companion was looking for the blanket on the other side, and neither of them saw the defendant's wagon before the collision, it cannot be held as a matter of law that the plaintiff was so careless as to preclude his recovery, but the question should be submitted to the jury. *Fox* v. *Sackett*, 535.

See RAILROAD, 6–9.

OFFICER.

The owner of goods cannot maintain an action against an officer for taking them in the due service of a writ of replevin against another person who had them in his possession. *Willard* v. *Kimball*, 211.

See ATTACHMENT; ERROR, 2; SHERIFF; WARRANT.

PARENT AND CHILD.

If a married woman who has been compelled to live separate from her husband by reason of his intemperance and crime is unable to provide for her children, and thereupon voluntarily gives them up to a charitable institution established for the purpose of furnishing homes to destitute children, under a written contract by which the children are to be placed out or adopted in a good family, and she is not to seek to discover them or deprive such family of them, the contract is valid; but this court, on a *habeas corpus* afterwards brought by the parents to recover their children, will inquire whether the welfare of the children is properly attended to, and in so doing will not be restricted to the ordinary modes of trial, nor require the children to be brought into open court, or their residence disclosed to their parents. *Dumain* v. *Gwynne*, 270.

PARTNERSHIP.

See CONTRACT, 5; PROMISSORY NOTES, 4.

PAYMENT.

See EXECUTORS AND ADMINISTRATORS, 4.

PERPETUITY.

See CHARITABLE TRUSTS, 1–3.

PETITION FOR PARTITION.

A judgment creditor who has levied his execution upon an undivided interest in land of which the judgment debtor was not actually seised cannot maintain a

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petition for partition thereof, but, under Gen. Sts. c. 108, §§ 16, 48, must resort to a writ of entry. *Newton Bank* v. *Hull*, 144.

See MORTGAGE, 11.

PLEADING.

1 An averment in a declaration that the defendant has disabled himself from performing a contract does not show with sufficient legal certainty that he has not performed it. *Murdock* v. *Caldwell*, 299.

2. A declaration in a real action which alleges that a married woman disseised the demandant is not contradicted by proof of fraudulent conveyances to her, to her sole and separate use. *Blake* v. *Sawin*, 340.

3. A declaration alleging that "the defendant made a promissory note, a copy of which, with an indorsement thereon, is hereto annexed, payable to the plaintiff, and the defendant owes said plaintiff the balance due on said note and interest thereon," accompanied with a copy of the note and indorsement, is good, on demurrer. *Moore* v. *Royce*, 556.

4. In an action of tort in the nature of waste, all the owners of the place wasted must join as plaintiffs. *Bullock* v. *Hayward*, 460.

5. A right to commence such action passes by an assignment in insolvency. *Ib.*

6. The misjoinder of a plaintiff should be alleged in the answer, under the recent statutes of this commonwealth; but if it is not so alleged, and evidence is introduced without objection at the trial to prove such misjoinder, it is too late to object to its admissibility at the argument in this court. *Ib.*

See LORD'S DAY, 1.

PLEDGE.

See EQUITY, 3.

POLYGAMY.

1. In order to prove a former marriage in England, in support of an indictment for polygamy, a witness may testify to the general repute there, at a time anterior to his acquaintance with the defendant. *Commonwealth* v. *Johnson*, 196.

2. One may be found guilty of polygamy, under Gen. Sts. c. 165, §§ 4, 5, who has married here during the lifetime of his former wife, and within one year after leaving her in England, although she has never been out of England; and proof of these facts will support an indictment which alleges such second marriage, his former wife "not having been continually remaining beyond sea, and not having voluntarily withdrawn from" him, "and remained absent for the space of seven years together." *Ib.*

POOR DEBTORS.

After a judgment debtor, who has been arrested on an execution, has applied to a proper magistrate to have a time and place fixed for his examination as a poor debtor, and a time and place have been fixed accordingly and notice thereof given to the creditor, under Gen. Sts. c. 124, § 12, another magistrate

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has no jurisdiction, unless the former application is withdrawn, to take a recognizance under § 10, that he will deliver himself up for examination within thirty days; and a recognizance so taken is void. *Snelling* v. *Coburn*, 344.

POWER.

See WILL, 7.

PRACTICE.

1. If one of two defendants goes into insolvency, and this fact is suggested, the court may order the trial to proceed as to the other defendant. *Kennedy* v. *Doyle*, 161.
2. If an amendment is allowed to a plaintiff upon terms which are not complied with, and the case is nevertheless submitted to the jury without objection, the defendant cannot, after a verdict for the plaintiff, object to this course of proceedings; especially if the court order that judgment be not entered till the terms are complied with. *Cannon* v. *Leonard*, 247.
3. Under the *St.* of 1863, *c.* 180, § 2, modifying the 34th rule of the superior court, it is necessary for a party in that court to allege exceptions orally, if not in writing, to the rulings, charge or instructions of the judge, before the retirement of the jury. *Lee* v. *Gibbs*, 248.
4. The finding of an auditor that an insane party to an action is competent to testify, and his admission of the other party to testify in his own favor, can only be controverted upon a hearing before the judge; and such hearing can only be had upon a motion addressed to the judge, prior to the trial before the jury. *Kendall* v. *May*, 59.
5. If this court are equally divided in opinion upon a question presented on a bill of exceptions, the exceptions are overruled; and if, in such a case, exceptions have been overruled, no exception lies to the refusal of a single judge to postpone the entry of judgment, and to allow the case to go again before the whole court, on a motion for a re-argument. *Shannon* v. *Shannon*, 249.
6. This court cannot rule as a matter of law that a verdict should be set aside, the finding of which depends not only upon the finding of the jury upon several distinct facts, but also upon inferences to be drawn from them, if upon each of these facts there is sufficient evidence to make it a proper matter to be submitted to the jury. *Commonwealth* v. *Fitchburg Railroad Co.* 189.
7. If, in an action for trespass to real estate, the jury find for the plaintiff without assessing any damages, the court may amend the verdict by inserting nominal damages, and may render judgment thereon. *Chaffee* v. *Pease*, 537.
8. If the judge in the trial of a civil case, at the request of the jury, and without the knowledge of the parties, allows them to have a copy of the General Statutes in the jury room, while deliberating on their verdict, their verdict will be set aside. *Merrill* v. *Nary*, 416.
9. The refusal of a judge to make a special inquiry of a jury, on the morning after they had rendered their verdict, and after their separation, as to their finding upon a particular point, furnishes no ground of exception. *Green* v *Clay*, 90.

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10. A party cannot except to an erroneous instruction which is given to the jury at his request. *Dennis* v. *Maxfield*, 138.

11. If a case is submitted in the superior court to a jury under instructions to which no exception is taken, and afterwards in overruling a motion for a new trial the court considers and holds the law applicable to the case to be as ruled at the trial, no ground of exception lies open. *Kidney* v. *Richards*, 419.

12. A party who in the course of a trial has admitted the execution of a deed cannot afterwards in the same trial require it to be proved by calling the attesting witnesses. *Blake* v. *Sawin*, 340.

13. If a copy of a paper has been admitted as secondary evidence, and the original is subsequently found, it is within the discretion of the court to permit the original to be put in evidence, after the opening of the case of the adverse party. *Ib.*

14. It is not necessary to make a formal ruling to the jury that in a writ of entry the rights of the parties are to be determined upon strict principles of law, although the tenant asks for such ruling; but it is sufficient to rule that the case is to be tried upon the law and the evidence, like all other cases. *Ib.*

15. If the presiding judge, after admitting an incompetent letter, the contents of which are of a nature to prejudice the defendant in an indictment, to be read to the jury, reconsiders his ruling and instructs them to disregard it, but finally allows it to go with the other papers to the jury, against the defendant's objection, a new trial should be granted. *Commonwealth* v. *Edgerly*, 184.

16. The extent to which the cross-examination of a witness may be carried, in relation to events in his own life, long anterior to the existence of the matters in controversy in the suit, and having no connection therewith, rests within the discretion of the presiding judge. *Prescott* v. *Ward*, 203.

See MORTGAGE, 12, 13; PLEADING, 6.

## PRINCIPAL AND AGENT.

In the absence of a known contract to the contrary, a person put in charge of a saw-mill by the owner or lessee thereof may lawfully receive payment in money or otherwise for lumber sawed by him at the mill. And evidence of a custom in former years to make such payments to other persons so put in charge of the mill is competent. *Green* v. *Clay*, 90.

See TOWN TREASURER.

## PROMISSORY NOTES.

1. If a promissory note does not purport to have been given for value, and long after its delivery and acceptance it is signed by another person as promisor, and the date altered, such new signer cannot be held liable upon it without proof of a new consideration. *Courtney* v. *Doyle*, 122.

2. A notice of the dishonor of a note sent through the post-office and duly received by the indorser is sufficient to fix his liability; but such notice, if made out by a notary public and signed by mistake with the name of the maker of

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the note instead of with his own name, without the authority of the maker, is insufficient. *Cabot Bank* v. *Warner*, 522.

3. A promise by a debtor to make monthly payments upon certain of his overdue notes upon which his creditor has no security is not a good consideration for a promise by the creditor to forbear for a time to press for payment of another overdue note against the debtor, upon which there are indorsers; and such promise to forbear, on such consideration, will not discharge the indorsers. *Jennings* v. *Chase*, 526.

4. If one partner advances money for the benefit of another, to relieve him from his liability for the debts of the firm, and takes his note therefor, this is to be regarded as a private transaction, and the note may be enforced without reference to the state of the partnership accounts. *Chamberlain* v. *Walker*, 429.

5. If an administrator has in his possession a note due from his intestate and refuses to pay it or deliver it to the owner, an action at law may be maintained upon it, to recover the amount from the assets of the estate of the intestate. *Prescott* v. *Ward*, 203.

6. Delay by a man to fulfil a promise to marry, and services rendered to him by the woman during the continuance of the engagement, in procuring and taking care of his clothing, are a sufficient consideration for a promissory note given by him to her; and the fact that other motives entered into his mind and induced him to give it is immaterial. *Ib.*

See EVIDENCE, 15, 16; PLEADING, 3; STAMP.

## RAILROAD.

1. A railroad corporation is not authorized by common law to mortgage its franchise, without further authority than is conferred by its act of incorporation *Commonwealth* v. *Smith*, 448.

2. Corporations have the power by common law to issue bonds. But since *St.* 1854, *c.* 286, railroad corporations in this commonwealth have no power to issue bonds for the payment of money, except for the purposes and in the mode therein authorized; and all bonds issued otherwise are void, and a mortgage to secure such bonds is also void. *Ib.*

3. Although a railroad corporation which has issued such invalid bonds and mortgage does not seek to repudiate them, one who has taken a valid second mortgage which contains no covenants of warranty, but is not made expressly subject to the former mortgage, may take advantage of their invalidity. *Ib.*

4. Such second mortgagee has a plain, adequate and complete remedy at law, and therefore cannot maintain a bill in equity to procure the cancellation of the first mortgage, and thus remove a cloud upon his title. *Ib.*

5. A provision in the charter of a street railway company that, at any time after the expiration of ten years from the opening of any part of the road for use, a city may purchase of the corporation so much of the corporate property as lies within its own limits, at a specified price, does not give to the city any such interest or right as to enable it to maintain a bill in equity to restrain the corporation from raising passenger fares upon their road, in violation of

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conditions expressly assented to by the corporation, and imposed upon them by the mayor and aldermen of the city when granting to them the power to locate and build a new line of their railway through additional streets, if they are guilty of no fraudulent intent to destroy or depreciate the value of the corporate property; although the value of their franchise and property will be thereby diminished, and the portion of their railway constructed under such authority will perhaps be exposed to forfeiture. Nor can the mayor and aldermen of the city maintain such bill. *City of Cambridge* v. *Cambridge Railroad Co.* 50.

6. If a railroad company have made a private crossing over their track, at grade, in a city, and allowed the public to use it as a highway, and stationed a flagman there to prevent persons from undertaking to cross when there is danger, they may be held liable in damages to one who, using due care, is induced to undertake to cross by a signal from the flagman that it is safe, and is injured by a collision which occurs through the flagman's carelessness. *Sweeny* v. *Old Colony & Newport Railroad Co.* 368.

7. If a railroad train is stopped, at night, merely for the purpose of allowing a train which is expected from the opposite direction to pass by, and no notice is given by the servants of the company to passengers that they may leave the cars, one who leaves the cars and walks into an open cattle-guard and receives a personal injury cannot maintain an action against the company to recover damages therefor; and it is immaterial that he was misinformed by some person not in the employment of the company that he must go and see to having his baggage passed at a custom-house, supposed to have been reached by the train, or that the train was near a passenger station, which was not the place of his destination. *Frost* v. *Grand Trunk Railroad Co.* 387.

8. A railroad corporation is not responsible to a person employed by it to repair its cars, for a personal injury arising from the negligence of a switchman, in failing properly to adjust a switch upon the track over which he is carried by the corporation, free of charge, between his home and the place of his work, provided the corporation has used due care in the selection of the switchman; but if the switchman was an habitual drunkard, and this fact was known or ought to have been known to the corporation, and the injury resulted from his intoxication, the corporation is responsible. *Gilman* v. *Eastern Railroad Corp.* 233.

9. A traveller upon a highway which is crossed by a railroad on a level, who knows that he is near the crossing and yet does not look up to see if a train is coming, simply because there is a storm and the travelling is bad, is guilty of such negligence that he cannot recover damages for an injury sustained by him from a collision with a passing train, although the bell was not rung nor the whistle sounded. *Butterfield* v. *Western Railroad Corp.* 532.

## RELEASE OF ERRORS.

See ERROR.

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## REPLEVIN.

A defendant in replevin who prevails in the action is entitled to judgment for a return, although he has gone into insolvency during the pendency of the action, if the assignee in insolvency does not appear to defend the same. *Hallett* v. *Fowler*, 36.

See OFFICER.

## REVIEW.

If, on a petition for review of a judgment, a bond is given providing that the petitioner "shall forthwith prosecute a review of said action to final judgment, and satisfy such execution as may be issued against him on the review," and no writ of review is granted, but the petition is dismissed, there is a breach of the condition of the bond. *Randall* v. *Bancroft*, 346.

## SALE.

1. The rule of law that the measure of damages in an action for breach of warranty on the sale of a chattel is the difference between the actual value of the article sold and its value if it had been as warranted, is not affected by proof that the purchaser subsequently resold it for an increased price, especially if it does not appear that such sale by him was without warranty. *Brown* v. *Bigelow*, 242.

2. A bill of sale of "one horse, sound and kind," is a warranty of soundness, upon which the vendor is liable if the horse proves to be permanently lame, although the purchaser knew that he was lame a week before the sale, and his lameness was talked of before the sale, and the vendor then refused to give a warranty. *Ib.*

See CORPORATION, 1; MORTGAGE, 17.

## SCHOOL.

1. If one who has been authorized by the school committee of a city to take charge of an evening school employs a person to render needful assistance in preserving order outside of the door while the school is in session, the city is liable to pay a reasonable compensation to such person, although the committee have never acted as a body upon this particular matter; and, in such case, evidence is incompetent to show that in former years the school was under the sole control of the committee, or that the committee had rejected the claim for compensation. *Huse* v. *City of Lowell*, 149.

2. A truant officer, appointed under Gen. Sts. *c.* 42, § 5, does not hold over after the expiration of his year, although no other has been appointed in his place. *Ib.*

## SCIRE FACIAS.

1. On a *scire facias* to obtain a new execution, when the levy of the first execution has proved ineffectual, no matters are properly open in defence which existed prior to the rendition of the judgment. *Richardson* v. *Wolcott*, 439.

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2. If such levy was made upon the property of only one of two judgment debtors, he is bound by a judgment, deciding the levy to be ineffectual, in a petition for partition to which the other judgment debtor was not a party. *Ib.*

SEAL.

1. A fac simile of the seal of a corporation printed upon blank forms of obligations prepared to be executed by the corporation at the same time when the blank is printed and by the same agency is not a seal, at common law, nor will such forms, when executed by the corporation, be contracts under seal, although the language of them calls for a seal. *Bates* v. *Boston & New York Central Railroad*, 251.

2. The *St.* of 1855, *c.* 223, providing that the mere impression of the seal of a corporation upon any legal instrument executed by such corporation shall thenceforth be valid, is not retrospective in its operation. *Ib.*

SHERIFF.

1. It is not the duty of an officer who serves a writ of possession to expel from the premises any persons who were in possession, claiming title in themselves, at the time when the suit was commenced in which the writ issued, and who do not claim under the person against whom that writ runs, nor resist the officer in his attempt to remove the latter and those claiming under him. *Clark* v. *Parkinson*, 133.

2. If personal property which has been attached on a writ is surrendered by the officer to the defendant therein, upon his request, and upon the substitution of an equivalent in money therefor, and the officer thereupon simply returns an attachment of the money, the defendant in the writ cannot maintain an action against the officer for the original attachment of the property, although the writ is not returned to court. *Taylor* v. *Knowlton*, 137.

SHIP.

If a written contract by which the master of a whaling ship is employed provides that he shall have a certain "lay" on the proceeds and also an additional compensation depending upon the amount of the cargo, and he is wrongfully discharged by the owners before the expiration of the contract, he may recover, as part of his damages, his share of the earnings of the ship both before and after his removal. *Dennis* v. *Maxfield*, 138.

SLANDER.

In an action for slander the truth of the words spoken is a justification, although they were spoken maliciously, and without any reason to suppose that they were true. *Foss* v. *Hildreth*, 76.

SOLDIER.

See INDICTMENT, 2.

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## SPENDTHRIFT.

See GUARDIAN AND WARD.

## SPIRITUOUS AND INTOXICATING LIQUORS.

1. The payment of a license fee and a tax to the United States under the internal revenue acts does not authorize the sale of intoxicating liquors in this commonwealth in violation of the laws of this commonwealth. *Commonwealth* v. *Holbrook*, 200.
2. The selectmen of a town are not liable to the penalty provided by Gen. Sts c. 86, § 17, for a failure to appoint an agent for the sale of spirituous and intoxicating liquors, if they have in due season appointed a person who has declined to serve, and there has been no careless omission or wilful neglect to appoint another. *Sears* v. *Tyler*, 469.
3. Evidence that the business of an insolvent debtor was the sale of intoxicating liquors at retail, and that the notes which he owed were all given to pay for such liquors, is not sufficient to prove that the consideration of them was illegal, or to call for a ruling in regard to the effect which would be produced upon an action brought by his assignees to set aside a conveyance by him as fraudulent, if the consideration were illegal. *Blake* v. *Sawin*, 340.
4. If an indictment contains two counts, the first of which charges the defendant with having been a common seller of intoxicating liquors during a certain period, and the second with having made a single sale within the same period, the defendant may be tried upon the first count, although he has pleaded guilty to the second; and if found guilty upon the first count judgment may be rendered thereon against him, and a *nolle prosequi* entered upon the second count. *Commonwealth* v. *Mead*, 396.

## STAMP.

An innocent omission to cancel a revenue stamp upon a promissory note in the mode prescribed by statute is no ground of defence to an action upon the note. *Desmond* v. *Norris*, 250.

## STATUTES CITED, EXPOUNDED, &c.

### ENGLISH STATUTES.

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| 3 Edw. I. | Limitations | 561 |
| 20 Hen. III. c. 8. | Limitations | 561 |
| 32 Hen. VIII. c. 2. | Limitations | 562, 564 |
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| 5 W. & M. *c.* 7, §§ 10, 21. | Soldier | 581 |
| 28 Geo. II. *c.* 9. | Mortmain | 6 |
| 7 Will. III. c. 6. | Registration | 164 |
| 9 Will. III. *c.* 9. | Limitation | 563 |
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## SUBROGATION.

See MORTGAGE, 10.

## TAX.

1. This court will not restrain by injunction the collection of a town tax "for contingent expenses," if it appears that the objects for which the money is wanted were stated orally at the meeting at which the vote to raise the money was passed, that no objection to the form of the vote was then made, that the objects for which it was raised were necessary expenditures of the town, that no appropriation of any part of the money to any unlawful purpose is intended, and that for many years the town has been in the habit of passing votes to raise money in that form. *Freeland* v. *Hastings*, 570.
2. The legislature have power to authorize towns to raise money by taxation for the purpose of refunding sums which have been contributed by individuals into a common fund for the general purpose of filling quotas of troops under calls of the president of the United States during the recent war; but not for the purpose of refunding sums paid by individuals for substitutes. *Ib.*
3. Towns may raise money at a meeting duly called after the annual meeting; and if at the annual meeting they have voted to raise so much money as to

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require the assessment of the full sum allowed by law to be assessed upon polls in any one year, a tax subsequently voted must be assessed only upon property. *Ib.*

4. Bonds issued under special legislative authority, by a state or city, for aiding in the construction of railroads, are public stocks, and taxable as such, under Gen. Sts. c. 11, § 4. *Hall* v. *County Commissioners of Middlesex*, 100.

5. Assessors of taxes are not bound by a list of property brought in for assessment and sworn to, if it appears from an examination of the person who brings it in that it is not true. *Ib.*

6. No action lies to recover back a tax paid before process had been issued for its collection, although the tax was illegal. *Barrett* v. *City of Cambridge*, 48.

See ASSUMPSIT, 5.

TOWN.

See WATERCOURSE, 3.

TOWN TREASURER.

1. If the inhabitants of a town have by vote authorized their treasurer to borrow money for the adjustment of a state tax for the reimbursement of bounties to volunteers, and the tax has been adjusted without the necessity of borrowing money, his authority to borrow money under that vote thereupon ceases. *Benoit* v. *Inhabitants of Conway*, 528.

2. If a town treasurer without authority borrows money on the credit of the town, and gives his note as treasurer, and mingles the money with his own private funds, by depositing the same to his own credit in a bank where he keeps an account in his own name, and uses the whole fund indiscriminately for the payment of his own debts and the debts of the town, so that the borrowed money cannot be specifically traced as having been applied in payment of the debts of the town, the lender cannot maintain an action against the town for money had and received. *Ib.*

3. Authority in a town treasurer to borrow money on the credit of the town cannot be established by proof of a long continued practice of the town, by their treasurer, to borrow money and give and pay notes therefor, without any votes of the town, and at the end of each year to report to the town a list of the amounts borrowed and of the notes given and paid, and of the acceptance of such reports by the town; there being no such report of the borrowing of the money in controversy. *Ib.*

TRESPASS.

A mere occupant of land cannot maintain an action against the true owner for a trespass thereon; and therefore in such action evidence of matters in aggravation is incompetent. *Merriam* v. *Willis*, 118.

See ATTACHMENT, 1; OFFICER.

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TRUANT OFFICER.

See SCHOOL, 2.

TRUST.

A voluntary conveyance, absolute in form, even though aided by an oral agreement of the grantee to hold the premises for the benefit of the grantor, raises no trust in favor of the grantor which can be enforced in this commonwealth. *Titcomb* v. *Morrill*, 15.

TRUSTEE PROCESS.

See COSTS, 2; GUARDIAN AND WARD, 2.

USAGE.

See INSURANCE, 3.

USURY.

1. No sum can be recovered as a forfeiture for usury, under Gen. Sts. *c.* 53, §§ 4, 5, unless there has been an actual payment or tender of more than the amount borrowed with lawful interest. *Smith* v. *Robinson*, 130.
2. If a suit in equity is brought to redeem land from a mortgage which was made upon a usurious contract, and the defendant in his answer claims rights under it, and declines to release the same without a further payment, the plaintiff is entitled to a deduction of the statute forfeiture for usury, or so much of it as is required to discharge the amount remaining due on the mortgage, and to judgment for redemption and costs. *Ib.*

See CONTRACT, 1.

WARRANT.

A warrant to arrest "John Doe or Richard Roe, whose other or true name is unknown," without any further description or means of identification of the person to be arrested, is void; and any person sought to be arrested upon such a warrant may lawfully resist, and third persons may lawfully aid him in such resistance, using no more force than is necessary to prevent the arrest. *Commonwealth* v. *Crotty*, 403.

WARRANTY.

See SALE.

WASTE.

See PLEADING, 4.

WATERCOURSE.

1. The owner of a mill, situated upon a small stream, by erecting a reservoir dam a short distance above, and exercising control of the water of the stream,

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under claim of right, by means of gates built in the reservoir dam, drawing more or less than the natural flow of the stream, as he has occasion, for more than twenty years uninterruptedly, may acquire a right so to use the water, as against the intermediate owners of the land over which the stream passes; and may maintain an action to recover damages against such an intermediate owner, who substantially interferes with this right. *Brace* v. *Yale*, 441.

2. If the rightful flow of the water of a stream is obstructed by the joint action of several parties, although not acting in combination or by concert, it is no defence to the maintenance of an action against one of them that all are not joined as defendants; but this objection goes only to the damages. *Wheeler* v. *City of Worcester*, 591.

3. A city is not liable in an action at law for an injury to a private person by the obstruction of the flow of the water of a stream, caused by an increase of the surface wash from the streets into the same, if such increase is only the natural result of the growth of the city; or by the emptyings of the sewers into the same, if these are no greater than would otherwise have been carried in by surface washings, and are not sufficient to exert any appreciable effect on such person; or by a bridge constructed by a railroad corporation, under the authority of its charter; or by a bridge constructed by the city, if the bridge when built was sufficient to allow the free flow of the water as the stream then was, or with such changes as were likely to be produced by natural causes alone, although it has proved insufficient for this purpose, with such changes as have been produced by the exercise by a railroad corporation of its chartered rights, or by the wrongful acts of individuals. *Ib.*

See EASEMENT, 1.

## WAY.

1. If a travelled way, either public or private, over lots adjoining a public street in a city and leading into that street, for a long time before and after the existence of an excavation in the street, has been so much used by persons having occasion to pass as to become known as a common way for travel and to make it reasonably necessary for the city, in the exercise of due and proper care, to provide a barrier for the purpose of preventing travellers, who pass over such way from the adjacent lots into the street and use due care, from falling into the excavation, and the city have unreasonably omitted to erect such barrier, they are guilty of negligence and are liable for an injury happening to a traveller in the street by reason thereof. *Burnham* v. *City of Boston*, 290.

2. This court cannot decide on a bill of exceptions that riding a safe horse on a dark night, bareback and without martingales, over a familiar road, by a person accustomed to the use of horses and to that horse, and turning out upon meeting a carriage, show such want of ordinary care as to prevent a recovery for an injury sustained by reason of a defective highway. *Stevens* v. *Inhabitants of Boxford*, 25.

3. In an action against a town to recover for a personal injury sustained by the

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plaintiff, while riding on horseback upon a highway, by going off a bank where there was no railing, the defendants asked the court to instruct the jury that if the plaintiff's horse passed the bank wall in safety, and, while proceeding in the adjoining field, stepped on ice and slipped down and thus injured the plaintiff, he could not recover. The judge gave this instruction, and added that if the horse, by reason of the want of a railing, went over the bank wall, and immediately and while under the same impulse or impetus slipped on ice in the field and fell, thereby injuring the plaintiff, the town would be liable. *Held*, that the defendants had no ground of exception. *Ib.*

4. If, in an action against a city to recover damages for an injury sustained by reason of a defective way, the defect alleged is ice on a sidewalk, and the defendants have been allowed to prove that rain had fallen and frozen shortly before the time of the accident, so that all the sidewalks in the city were covered with ice, evidence is inadmissible, in their behalf, to prove the steps actually taken by them to remedy the defect. *Payne* v. *City of Lowell*, 147.

See LORD'S DAY.

WILL.

1. An heir at law, who is disinherited, is a competent witness in support of the will. *Sparhawk* v. *Sparhawk*, 155.
2. The executor named in a will is a competent subscribing witness thereto, and may testify in support thereof, under the statutes of this commonwealth, although he has not declined the trust. *Wyman* v. *Symmes*, 153.
3. A will which bears the genuine signatures of three competent subscribing witnesses, who signed their names simply as "witness to signature," with nothing further, may be admitted to probate, although neither of the two survivors of them recollects anything about the circumstances under which it was executed. *Eliot* v. *Eliot*, 357.
4. If the due execution of a will is controverted, on appeal from a decree of the judge of probate, devisees named therein have a right to appear as parties to establish it, although an administrator with the will annexed has been appointed and appears for the same purpose. *Ib.*
5. A married woman may, by a will duly executed with her husband's written assent, dispose of all her real estate, so as to cut off his right as tenant by the curtesy. *Silsby* v. *Bullock*, 94.
6. A testator gave to his wife the income of certain real and personal property, and directed that upon her death the same should be sold and the money arising therefrom should be paid over to a charitable society on condition that they should keep his tomb in repair. His wife lived several years, and during her life kept the tomb in repair. Two years after her death, and as soon as the society knew of the bequest, they voted to accept it, and assumed the care of the tomb. *Held*, that they were entitled to the benefit of the bequest. *Giles* v. *Boston Fatherless & Widows Society*, 355.
7. If a testator, after disposing of all his estate by will, conveys land in trust for his six children and their issue, and in case of their death without issue then

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for his heirs, reserving to himself full power to alter the trusts by deed or will marries a second wife; loses one child; and subsequently makes a codicil to his will, giving to his wife "in fee simple one sixth part of the whole estate and property, real, personal and mixed, whereof I die possessed, it being my intention to give to her what would be her legal share if she were one of my children," and ratifies and confirms his will in all respects in which it is not qualified by the codicil; and if in the will and deed of trust he has preserved equality among his children; this codicil will operate as an execution of the power of disposal, which the testator reserved to himself, of the estate conveyed by the deed of trust, and his widow will be entitled to one sixth of his whole estate, and the other five sixths will be disposed of according to the directions of the will, irrespective of the deed of trust. *Willard* v. *Ware*, 263.

8. A testator left a large estate to trustees, making provision for the selection by them of certain boys to be bound out as apprentices on certain terms and conditions, until their arrival at the age of twenty-one years, each of whom, at any time within six years thereafter, if he should have conducted himself well and faithfully meanwhile, should at the discretion of the trustees receive a loan of money from the income of the trust fund, not exceeding five hundred dollars, for a term not over five years, on his furnishing good security for the repayment of the same at the expiration of said term, with interest; and providing further, that if at the end of said term the interest should have been punctually paid, and the conduct of the borrower should have been such as to satisfy the trustees that he would in future make a good use of the money, the obligation should be cancelled and given up, without the payment of the principal. *Held*, that the trustees have no authority to cancel and surrender, without the payment of the principal, any such obligation to the legal representatives of a borrower who has died before the expiration of five years from the time of the loan to him. *Trustees of Smith Charities* v. *Northampton*, 498.

9. A testator, in devising an estate to trustees for charitable purposes, provided that the trustees should be elected annually as follows: that eight towns, which were named, should annually choose in town-meeting one elector each, who should meet and elect by a majority vote three trustees. Until after the testator's death, a majority had always been necessary for the election of public officers in Massachusetts. *It seems*, under these circumstances, that a majority vote is required for the election of a trustee, although other officers are now elected by a plurality. *Ib.*

See CHARITABLE TRUSTS; EXECUTORS AND ADMINISTRATORS, 4.

## WITNESS.

Although a party to an action is insane, yet if he is competent to testify the other party may be admitted to testify in his own favor, under Gen. Sts. c. 131, § 14. *Kendall* v. *May*, 59.

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